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No. 07-533

In the

Supreme Court of the United States

EUGENE MONGEAU,

Petitioner,

v.

CITY OF MARLBOROUGH and STEPHEN REID, individually and as Commissioner of Inspectional Services and as a Member of the City of Marlborough Site Plan Review Committee,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

When it is alleged that a local official denied a land use permit without any health, safety, or welfare justification, is the standard for determining whether the decision violates substantive due process a "shocks the conscience" test, as the First and Third Circuits hold, or a rational basis analysis, as applied in the Second, Fourth, Fifth, Sixth, Seventh, and Ninth Circuits?

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PETITION FOR WRIT OF CERTIORARI

Eugene Mongeau respectfully petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the First Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 492 F.3d 14 (1st Cir. 2007), and is included as Appendix (App.) A. The opinion of the district court, included as App. B., is reported at 462 F. Supp. 2d 144 (D. Mass. 2006).

JURISDICTION

The judgment of the Court of Appeals for the First Circuit was entered on June 22, 2007. On August 17, 2007, this Court issued an Order granting Petitioner's motion to extend the time for filing this petition until October 20, 2007. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AT ISSUE

The Fourteenth Amendment to the United States Constitution provides that no state shall "deprive any person of life, liberty, or property, without due process of law." Amend. XIV, U.S. Const.

INTRODUCTION

This case raises the issue of the proper standard of review for determining whether a local government's denial of a land use permit violates the substantive guarantees of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. The federal circuits are in disarray on this issue, and are in particular conflict on whether the "shocks the conscience" analysis this Court articulated in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), governs substantive due process claims in the land use context. In the decision below, the First Circuit Court of Appeals concluded that *Lewis* and its "shocks the conscience" standard indeed control land use claims, thereby putting that circuit in conflict with others that apply a rational basis or arbitrariness analysis.

The underlying dispute in this case arises from Petitioner Eugene Mongeau's (Mongeau) lengthy and ultimately unsuccessful attempts to secure a valid building permit from the City of Marlborough, Massachusetts (City), and its leading permitting official, Stephen Reid (Reid). Although Mongeau received approval from all relevant local and state land use bodies, Reid actively thwarted these approvals and ultimately refused to issue a permit due to his personal hostility to Mongeau, and without any rationale related to the public's health, safety, or welfare.

As a last resort, Mongeau brought legal action, alleging that Reid's refusal to issue a permit violated Mongeau's constitutionally guaranteed right to substantive due process. The district court applied a "shocks the conscience" analysis to Mongeau's claim, and concluded that his allegations did not state a

substantive due process violation under this analysis. On appeal, the First Circuit affirmed. In the decision below, the First Circuit rejected Mongeau's argument that the "shocks the conscience" test does not control in the deliberative land use context, and that a rational basis analysis should instead apply. This ruling conflicts with the decisions of other circuits, and with the decisions of this Court, and therefore warrants the granting of this petition.

STATEMENT OF THE CASE

A. Facts

In 1991, the City decided to exercise its eminent domain power to take three parcels among five belonging to Mongeau. App. B at 3. The targeted parcels hosted two buildings owned by Mongeau, from which Mongeau derived rental income. The City intended to take these parcels for development of a city fire station. *Id.* Such a taking would leave Mongeau with two vacant parcels that had been environmentally contaminated prior to Mongeau's ownership. *Id.*

The City and Mongeau subsequently entered into an agreement (Agreement) whereby Mongeau would accede to the taking in return for $450,000, the right to build a 60' x 80' structure on his remaining vacant property, and the City's promise to maintain a right-of-way providing access to this remaining land. App. B at 3-4.

After the Agreement was complete, Mongeau spent nearly $700,000 on environmental cleanup and other costs to prepare his remaining property for the structure agreed to by the City. App. B at 4. Mongeau

eventually submitted an application for construction of a building less than half as large, by square footage, as the one authorized by the Agreement. *Id.*

In his capacity as Commissioner of the City's Inspectional Services–the chief authority for issuing building permits–Reid denied Mongeau's initial application on the grounds that the property lacked proper street access and frontage. Mongeau soon submitted a second, modified application; Reid also denied this application for lack of sufficient street access. *Id.* When Mongeau appealed the second denial to the City's Zoning Board of Appeals (Board), Reid opposed this appeal. In so doing, he expressed a personal belief that Mongeau already had profited sufficiently from the property and had no right to build, notwithstanding the Agreement dating from the eminent domain action. App. B at 5.

The Board unanimously approved Mongeau's proposed project, reversing Reid's denials and rejecting his opposition to the project. *Id.* It issued Mongeau a permit that would expire in one year, and noted that any building plans would require review by the City Conservation Commission and the Site Plan Review Committee, of which Reid was a member. *Id.* Mongeau soon addressed every concern raised by Reid in this capacity. However, due to extended delays and demands in that process, Mongeau was forced to seek a six-month extension of time on his permit. *Id.* The Board granted his request.

When the new six-month period approached expiration without any decision, Reid advised Mongeau that he should seek yet another extension. App. B at 5-6. When Mongeau did so, Reid threatened to appeal any renewed permit, presumably to the state

Department of Environmental Protection (DEP), and declared that he had no intention of ever issuing a permit. App. B at 6. Despite this, Mongeau obtained yet another six-month extension from the Board. *Id.* Well before this period expired, Mongeau received final approval from both the Site Plan Review Committee and the City's Conservation Commission. *Id.*

Mongeau was unable to act on the approvals, however, as Reid had orchestrated an appeal to Massachusetts DEP in order to delay the project and cause the existing permit to expire. *Id.* Although the state DEP eventually rejected Reid's appeal–at which point all local and state bodies had signed off on Mongeau's plans–the existing permit had indeed expired during the appeal, as Reid intended. *Id.* Nevertheless, possessing the approval of all relevant state and local bodies, Mongeau submitted a third application for a permit to Reid. Reid denied it, citing the manufactured expiration of the prior permit and the unexplained conclusion that the project was "deficient in many ways." *Id.*

B. The District Court Decision

Mongeau timely filed a complaint against Reid and the City in Massachusetts Superior Court. The suit was premised on various state law claims and a federal claim, pursuant to 42 U.S.C. § 1983, alleging the deprivation of property rights in violation of the Due Process Clause of the Fourteenth Amendment. App. A at 4. The Defendants removed the case to federal district court based on the due process issue and filed a motion for judgment on the pleadings. *Id.* On November 13, 2006, the district court issued a published opinion granting this motion and dismissing Mongeau's federal claims. *Mongeau v. City of*

Marlborough, 462 F. Supp. 2d 144 (D. Mass. 2006); *see* App. B.

In considering Mongeau's substantive due process claim, the district court ruled that Mongeau's allegations had to "shock the conscience" in order to state a claim for a violation of constitutional due process guarantees. App. B at 13. The court went on to hold that Reid's alleged actions did not "shock the conscience," and therefore that Mongeau stated no viable substantive due process claim. App. B at 14.

C. The First Circuit Opinion

On appeal, Mongeau argued that the "shocks the conscience" test, derived from police abuse cases, was not the proper standard for determining whether a land use permit denial violated substantive due process. App. A at 6. Mongeau specifically argued that a rational basis, or arbitrary or capricious analysis, rather than the "shocks the conscience" test, was the proper method for determining whether a deliberative administrative decision, such as a land use permit denial, infringed on due process protections. *Id.*

The First Circuit rejected Mongeau's arguments. *Mongeau v. City of Marlborough*, 492 F.3d 14 (1st Cir. 2007); *see* App. A. The court initially disagreed with the proposition that *Lewis* applies only "when [the defendants] have not had time to deliberate before coming to a decision to engage in the behavior that is the basis of the claim." App. A at 6. In the lower court's view, *Lewis* set a standard for both exigent and deliberative conduct, under which "only conscience-shocking behavior will constitute a substantive due process violation." App. A at 7. Avoiding any doubt as to whether the "shocks the conscience" test applies to

the land use context, the First Circuit stressed that "in order to state a substantive due process claim *of any ilk*, a plaintiff must allege behavior on the part of the defendant that is so outrageous that it shocks the conscience." App. A at 10 (emphasis added).

Applying this test to Mongeau's allegations, the First Circuit held that Mongeau did not state a claim for a violation of substantive due process because the allegations did not sufficiently "shock the conscience." App. A at 10-11. The court specifically stated that the "district court determined that nearly all of Mongeau's allegations–that Reid had denied his building permit and interfered in the zoning process for improper reasons–failed to shock the conscience. We agree." App. A at 10.

Because this decision conflicts with the decisions of other circuits, and the decisions of this Court, Petitioner Mongeau now timely asks this Court to exercise plenary review over the decision below.

REASONS FOR GRANTING THE WRIT

I

THERE IS A CONFLICT AMONG THE CIRCUITS ABOUT WHETHER A "SHOCKS THE CONSCIENCE" TEST, OR A RATIONAL BASIS ANALYSIS, CONTROLS SUBSTANTIVE DUE PROCESS CLAIMS ARISING FROM THE DELIBERATIVE LAND USE CONTEXT

In *Lewis*, this Court considered whether a substantive due process claim was stated where a high-speed police chase resulted in the death of a young motorcycle passenger. 523 U.S. at 836-37. Noting that the split-second nature of many police decisions merits a standard deferential to that class of government action, the Court held that a "shocks the conscience" test governed the substantive due process claim.[1] *Id.* at 846-47, 851. In so doing, the Court distinguished between the kind of impulsive action at issue in police cases such as *Lewis*, and the more "deliberative" government actions found in other contexts. *Id.* at 851-52.

Some lower courts have accordingly construed Lewis' "shocks the conscience" test to be limited to police actions. *See Khan v. Gallitano*, 180 F.3d 829, 836 (7th Cir. 1999) ("the [*Lewis*] Court made clear that

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[1] *Lewis* built on *Rochin v. California*, 342 U.S. 165 (1952). Like *Lewis*, *Rochin* involved a substantive due process claim arising from allegedly abusive police action–the use of a stomach pump to extract evidence from a defendant. The Court held that the claim was valid, describing the police action as "conduct that shocks the conscience." 342 U.S. at 172.

its shocks-the-conscience analysis was not generally applicable to all substantive-due-process claims.") (citations omitted); *Moreland v. Las Vegas Metro. Police Dep't*, 159 F.3d 365, 372-73 (9th Cir. 1998) (noting that "the Supreme Court limited the holding in *Lewis* to the facts of that case (i.e., to high-speed police chases)") (parenthetical in original); *Braley v. City of Pontiac*, 906 F.2d 220, 226 (6th Cir. 1990) ("Applying the 'shock the conscience' test in an area other than excessive force . . . is problematic. . . . We doubt the utility of such a standard outside the realm of physical abuse, an area in which the consciences of judges are shocked with some degree of uniformity."). Others, including the First Circuit, have rejected such limits. App. A at 7.

The conflict among the circuits on whether and where the "shocks the conscience" test controls is particularly concrete in the land use permitting context, where courts have historically applied a rational basis approach. While most Circuits have retained a rational basis or arbitrary and capricious standard as the governing test in land use cases, others, including the court below, have extended *Lewis*' "shocks the conscience" analysis to that context. This difference often determines whether a substantive due process complaint will state a viable claim or be dismissed. This Court should grant the Petition to resolve the conflict.

A. Six Circuits Apply a Rational Basis Analysis to Substantive Due Process Claims Arising from the Deliberative Land Use Context

Among the Federal Courts of Appeal, the Second, Fourth, Fifth, Sixth, Seventh, and Ninth Circuits review substantive due process land use claims using some form of a rational basis analysis. Under this approach, claims similar to those raised by Mongeau have been found viable.

1. Fifth Circuit

The Fifth Circuit has steadfastly adhered to a rational basis test in reviewing land use decisions claimed to violate substantive due process, in direct conflict with the decision of the First Circuit. In *Mikeska v. City of Galveston*, 451 F.3d 376 (5th Cir. 2006), for instance, property owners alleged a violation of substantive due process stemming from the city's refusal to issue a building permit after a tropical storm. 451 F.3d at 378. The appeals court reviewed this denial to determine whether it was "rationally related to a legitimate governmental interest." *Id.* at 379 (citing *Simi Inv. Co. v. Harris County*, 236 F.3d 240, 249 (5th Cir. 2000), *cert. denied*, 534 U.S. 1022 (2001), and *FM Props. Operating Co. v. City of Austin*, 93 F.3d 167, 172-74 (5th Cir. 1996)). Applying this test, the *Mikeska* court found that because there was no rational basis evident in the record, the property owners stated a viable claim. The court therefore remanded the case to the district court, which initially had granted summary judgment in favor of the city. *Id.*

2. Ninth Circuit

Like the Fifth Circuit, but in conflict with the court below, the Ninth Circuit utilizes a rational basis or arbitrary and capricious test in land use disputes.

In *Lockary v. Kayfetz*, 917 F.2d 1150 (9th Cir. 1990), several property owners raised a substantive due process claim based on a city's refusal to grant water hookups. The court opted to apply the rational basis test, noting that "the rational relation test will not sustain conduct by state officials that is malicious, irrational or plainly arbitrary." 917 F.2d at 1155. Under this test, the court reversed summary judgment against the property owners and remanded the claims for trial, writing that "[c]onstrued in the light most favorable to appellants, [the city authority's] refusal to grant water hookups to the [property owners] may have been arbitrary or even malicious conduct prohibited by due process . . . ." *Id.* at 1156.

To the same effect is *Herrington v. Sonoma County*, 834 F.2d 1488, 1495 n. 4 (9th Cir. 987), *cert. denied*, 489 U.S. 1090 (1989). There, the Ninth Circuit upheld a jury finding of a substantive due process violation under the arbitrariness test based on evidence that local officials had manipulated the decision-making process in order to prevent development. 834 F.2d at 1501. More recent decisions continue to apply a rational basis test. *See, e.g., Equity Lifestyle Prop. v. County of San Luis Obispo*, 2007 WL 2694677 at n. 16 (9th Cir. 2007) (noting particularly the impact of this Court's *Lingle* decision, *see* Part II *infra.*)

3. Second Circuit

In accord with the Fifth and Ninth Circuits, the Second Circuit also has favored the rational basis test when analyzing substantive due process claims against land use denials. In *Walz v. Town of Smithtown*, 46 F.3d 162, 167-69 (2d Cir. 1995), the Second Circuit upheld a finding of a substantive due process violation, arising from a permit denial based on improper motives, under the rational basis or arbitrariness standard. In the recent case of *O'Mara v. Town of Wappinger*, the Second Circuit confirmed that where a plaintiff alleges a violation of substantive due process rights owing to a land use permit denial, he must show that the denial occurred "in an arbitrary and irrational manner." 485 F.3d 693, 700 (2d Cir. 2007). This of course, is the very standard rejected by the court below, App. A at 6, resulting in a clear conflict between the First and Second Circuits.

4. Fourth Circuit

An "arbitrary or irrational" analysis is favored by the Fourth Circuit when it considers a substantive due process claim arising from a building permit denial. In *Scott v. Greenville County*, 716 F.2d 1409 (4th Cir. 1983), a property owner claimed that denial of a building permit for low-income housing violated his substantive due process rights without any legitimate reason. 716 F.2d at 1418. Applying an arbitrariness test, the Fourth Circuit held that the owner stated a viable claim that his property was "taken from him by manifest arbitrariness and unfairness." 716 F.2d at 1421. *See also Tri-County Paving, Inc. v. Ashe County*, 281 F.3d 430, 440 (4th Cir. 2002) (substantive due

process plaintiff required to "demonstrate that the County's actions were arbitrary or irrational as required [by Circuit precedent]").

5. Sixth Circuit

Although it has expressed some uncertainty on the issue of the proper substantive due process test, the Sixth Circuit appears to apply a rational basis analysis in land use cases. In the 1992 case of *Pearson v. City of Grand Blanc*, arising out of a local government denial of a rezoning application, the court authored what is among the more comprehensive accounts of the inter-circuit confusion surrounding the proper substantive due process test. 961 F.2d 1211, 1217-22 (6th Cir. 1992). The court questioned whether it should apply an arbitrariness or rational basis test, or rely on some other approach.

Ultimately, the *Pearson* court rejected a "shocks the conscience" test for substantive due process claims arising from administrative land use decisions, and instead held that a substantive due process claim is properly stated if the decision is "arbitrary and capricious," or has "no rational basis." *Id.* at 1221. Post-*Lewis*, the Sixth Circuit has reaffirmed the validity of that test in land use cases. *See Brody v. City of Mason*, 250 F.3d 432, 438 (6th Cir. 2001) ("This court has held that to sustain a substantive due process claim, in the context of a zoning administrative action, 'a plaintiff must show that the state administrative agency has been guilty of 'arbitrary and capricious action' in the strict sense, meaning 'that there is no rational basis for the . . . [administrative] decision.'" (quoting *Pearson*) (alterations in original).

6. Seventh Circuit

The Seventh Circuit has decided few substantive due process land use cases. However, the relevant cases indicate that the circuit employs a rational basis test in settings similar to the instant case. In *Centres, Inc. v. Town of Brookfield*, 148 F.3d 699 (7th Cir. 1998), the appeals court reviewed the denial of a commercial building permit. The Seventh Circuit applied an "arbitrary or unreasonable" standard to determine whether the denial violated the applicant's right to substantive due process. 148 F.3d at 704. Similarly, in *Pro-Eco, Inc. v. Jay County*, 57 F.3d 505, 515 (7th Cir. 1995), *cert. denied*, 516 U.S. 1028 (1995), the court applied the "arbitrary and unreasonable" test to a land use moratorium, noting that the Seventh Circuit interprets "arbitrary and unreasonable" to "mean invidious or irrational." 57 F.3d at 515.

In sum, the Second, Fourth, Fifth, Sixth, Seventh, and Ninth Circuits rely on a rational basis or arbitrary and capricious analysis, rather than "shocks the conscience," to review substantive due process claims in the land use context. Under such a standard, allegations that a permit was denied for an illegitimate reason, for no police power purpose, out of animus, or solely to deny a property right, have been sufficient to state a claim. *See, e.g., Mikeska*, 451 F.3d at 379; *Lockary*, 917 F.2d at 1155; *Walz*, 46 F.3d at 167-69; *Scott*, 716 F.2d at 1418-21. In contrast, in the decision below and in prior cases, the First Circuit has held the same sort of allegations inadequate under the "shocks the conscience" test. App. A at 10-12. Consequently, it seems likely that Mongeau's complaint–that the denial of his permit was unrelated to any legitimate

planning concern–would be treated differently and be held to state a claim for a substantive due process violation if filed in the majority "rational basis" circuits, rather than in the First Circuit.

B. Like the First Circuit, the Third Circuit Relies Exclusively on the "Shocks the Conscience" Test in Land Use Cases

Although it is in the minority, the First Circuit is not alone in rejecting a rational basis or arbitrariness standard in land use cases in favor a "shocks the conscience" test. App. A at 7. The Third Circuit also has elected to follow this course. In *Eichenlaub v. Township of Indiana*, 385 F.3d 274 (3d Cir. 2004), *cert. denied*, 552 U.S. __ (Oct. 1, 2007), that court held that "whether a zoning official's actions or inactions violate due process is determined by utilizing a 'shocks the conscience' test." 385 F.3d at 285.

In *Eichenlaub*, the Third Circuit conceded that "shocks the conscience" is not precisely defined. *Id.* Yet, citing the Circuit's 2003 opinion in *United Artists Theatre Circuit, Inc. v. Township of Warrington*, 316 F.3d 392 (3d Cir. 2003), the court left no doubt that the rule remained controlling in Third Circuit land use permitting cases. 385 F.3d at 285. In both *Eichenlaub* and *United Artists*, the Third Circuit held that allegations that a permit denial was unrelated to any legitimate government purpose were insufficient to state a claim under the "shocks the conscience" test. *Eichenlaub*, 385 F.3d at 285-86; *United Artists*, 316 F.3d at 400-01. Indeed, since the "shocks the conscience" test has been in force, no court in the Third Circuit (as in the First) has ever found a sufficiently

stated land use substantive due process claim. *Id.* A petition for certiorari was filed in *Eichenlaub* to test the viability of the Third Circuit's strict "shocks the conscience" approach, but it was denied. 552 U.S. __ (Oct. 1, 2007). Thus, the Third Circuit, like the First, remains at odds with the majority "rational basis" circuits.

C. The Remaining Circuits Exhibit Intra-Circuit Confusion

The Eighth, Tenth, and Eleventh Circuits appear to be embroiled in internal conflicts over the appropriate standard in substantive due process land use cases. In 2001, the Eighth Circuit reviewed a governmental withholding of project approval, and a resulting substantive due process claim, by asking whether the government action was "truly irrational." *Iowa Coal Mining Co. v. Monroe County*, 257 F.3d 846, 853 (8th Cir. 2001). Five years later–without any reference to its decision in *Iowa Coal*–the Eighth Circuit decided another land use case by writing that "land use decisions . . . must therefore be so egregious or extraordinary as to shock the conscience." *Koscielski v. City of Minneapolis*, 435 F.3d 898, 902 (8th Cir. 2006).

Similar inconsistency is evident within the Tenth Circuit. Three years after *Lewis*, the Tenth Circuit used an "arbitrariness" standard to determine whether a denial of development rights constituted a substantive due process violation. *Signature Props. Int'l Ltd. P'ship v. City of Edmond*, 310 F.3d 1258, 1267 (10th Cir. 2002). Yet in 2006, the Tenth Circuit–like the Eighth in *Koscielski*, having neglected to cite the

circuit's earlier opinion, and having first laid out an arbitrariness standard–later in an opinion held that the "shocks the conscience" test controlled substantive due process land use claims. *Camuglia v. City of Albuquerque*, 448 F.3d 1214, 1222-23 (10th Cir. 2006).

The Eleventh Circuit historically has applied a rational basis analysis to substantive due process claims stemming from land use decisions. *See Resolution Trust Corp. v. Town of Highland Beach*, 18 F.3d 1536, 1549 (11th Cir. 1994) (holding that a city's irrational and arbitrary land use decisions violated a property owner's substantive due process rights). Yet more recently, in a police action case, the Eleventh Circuit declared that *Lewis* and its "shocks the conscience" test applies to "*any* claim to a substantive due process right." *Tinker v. Beasley*, 429 F.3d 1324, 1327 (11th Cir. 2005) (emphasis added). This mirrors the First Circuit's expansive view of *Lewis*, articulated in the decision below, but it is as yet unclear whether this will hold in Eleventh Circuit land use cases.

The circuit courts are in confusion about the proper standard to gauge whether a land use denial amounts to a violation of substantive due process guarantees. Moreover, differences on whether to apply a traditional rational basis standard or *Lewis*'s less-established "shocks the conscience" approach tend to determine whether a plaintiff can state a viable claim. This Court should grant the petition to resolve the conflicts between and within the circuit courts on this recurring constitutional issue.

II

APPLYING A "SHOCKS THE CONSCIENCE" TEST TO ALL SUBSTANTIVE DUE PROCESS CLAIMS, INCLUDING THOSE INVOLVING LAND USE DECISIONS, IS IN CONFLICT WITH THE OPINIONS OF THIS COURT

At first glance, it may appear as if the circuits' varying approaches are simply a reflection of this Court's own substantive due process jurisprudence. In various cases, this Court has sanctioned (1) the rational basis test, *see, e.g., Eastern Enterprises v. Apfel*, 524 U.S. 498, 537 (1998); (2) the "shocks the conscience" approach, *Lewis*, 523 U.S. at 846; and (3) a violation of a right "rooted in the concept of ordered liberty" test, *see Washington v. Glucksberg*, 521 U.S. 702, 720-21 (1997). However, when the examination is narrowed to substantive due process claims involving an alleged deprivation of *property* rather than liberty, this Court has uniformly applied some variant of a rational basis test. Land use disputes fall within this category; and accordingly, circuits applying a "shocks the conscience" test in land use cases do so in conflict with this Court's jurisprudence.

Property cases favoring a rational basis or arbitrary or capricious test trace to the first zoning decisions considered by this Court. In *Nectow v. City of Cambridge*, a 1928 decision, the Court held that

> [A] court should not set aside the determination of public officers in [zoning matters] unless it is clear that their action 'has no foundation in reason and is a mere

> arbitrary or irrational exercise of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense.'

277 U.S. 183, 187-88 (1928) (citation omitted).

In *Pennell v. City of San Jose*, 485 U.S. 1 (1988), the Court held that a California ordinance controlling the amount of rents charged by property owners would not pass substantive due process muster if shown to be "arbitrary, discriminatory, or demonstrably irrelevant to the policy the legislature is free to adopt. 485 U.S. at 11.

The Court also seemed to approve a rational basis test in its substantive due process analysis in *Eastern Enterprises*, 524 U.S. 498. In that case, a former coal company sued the Social Security Administration, bringing a claim that its substantive due process right had been violated by a federal law taking private moneys for a retiree benefit fund. 524 U.S. at 514-18. Although a plurality ultimately held that the application of the law amounted to a violation of the Takings Clause, the Court also wrote that "Eastern claims that the manner in which the Coal Act imposes liability upon it violates substantive due process. To succeed, Eastern would be required to establish that its liability under the Act is 'arbitrary and irrational.'" 542 U.S. at 537 (citation omitted).

Finally, and most recently, in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005), this Court indicated that whether a property regulation "fails to substantially advance a legitimate state interest" is an

inquiry properly within the ambit of the Due Process Clause, rather than the Takings Clause. 544 U.S. at 540-43. Noting that the "substantial advancement" test was derived from the Court's land use due process cases, the Court stressed that this is where it should remain. *Id.* at 540. Justice Kennedy wrote a separate concurring opinion, citing to *Eastern Enterprises*, for the specific purpose of noting that a substantive due process claim may be stated based on "arbitrary" land use regulation. *Id.* at 548-49 (Kennedy, J., concurring). During *Lingle*'s extensive discussion of takings and due process precedent in the land use context, no Justice suggested that the validity or legitimacy of land use regulation should hinge on whether it "shocks the conscience."

As the foregoing demonstrates, this Court always has treated substantive due process claims in the land use or property context as being governed by a rational basis or similar arbitrary or capricious standard. There is a sound doctrinal basis for this approach, and little justification for imputing the "shocks the conscience" analysis into land use decisions now. Specifically, the rational basis test is tailored to governmental decisions arising from a *reasoning* process. The test works in this context because it gauges whether the governmental decision was indeed the product of legal reasoning–due process of law–or instead unrelated to lawful considerations and thus a potential violation of substantive due process. *See Lawton v. Steele*, 152 U.S. 133, 136-37 (1894) ("the fundamental concept [of due process is] that certain government decisions must relate to a legitimate end of government and may not be made for no reason or for a bad reason"); *Hurtado v. California*, 110 U.S. 516,

536 (1884) ("Abritrary [sic] power, enforcing its edicts to the injury of the persons and property of its subjects, is not law, whether manifested as the decree of a personal monarch or of an impersonal multitude.").

By contrast, "shocks the conscience" is designed to apply where government officials cannot reason out their actions; that is, where a rational basis examination is simply not possible or fair. *Lewis*, 533 U.S. at 851-54. Such a situation is rarely found in the land use permitting context, as this case demonstrates. Here, the land use process went on for over three years, during which time Reid had sufficient opportunity to consider his decision on Mongeau's permit. App. B at 4-6. Given this reasoning context, both the holdings and logic of this Court's precedent indicate that the allegedly illegitimate denial of Mongeau's permit should be weighed under the rational basis test, rather than the "shocks the conscience" approach. *Nectow*, 277 U.S. at 187-88.

Nevertheless, in conflict with the decisions of many other circuits and the jurisprudence of this Court, the court below rejected the rational basis analysis in favor of applying the "shocks the conscience" test to Mongeau's claim. The Court should take this case to confirm that substantive due process claims against reasoned land use denials are not controlled by a "shocks the conscience" analysis, but rather by the traditional rational basis or arbitrary or capricious test found in this Court's property rights jurisprudence.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

DATED: October, 2007.

Respectfully submitted,

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Appendix A–1

No. 06-2666

UNITED STATES COURT OF APPEALS,

FIRST CIRCUIT

EUGENE MONGEAU,

Plaintiff-Appellant,

v.

CITY OF MARLBOROUGH, and STEPHEN REID, Individually and as Commissioner of Inspectional Services for the City of Marlborough and as a Member of the City of Marlborough Site Plan Review Committee,

Defendants, Appellees.

Heard May 10, 2007.

Decided June 22, 2007.

Before TORRUELLA and LIPEZ, Circuit Judges, and STAFFORD, JR.,* Senior District Judge.

TORRUELLA, Circuit Judge.

This case asks us to determine whether a plaintiff in a land-use dispute must prove that a defendant engaged in behavior that "shocks the conscience" in order to prevail on a substantive due process claim related to that dispute. Eugene Mongeau, a landowner, brought suit against the City of Marlborough (the "City") and Stephen Reid, the Commissioner of Inspectional Services for the City of Marlborough (collectively, "Defendants"), after Reid

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* Of the District of Northern Florida, sitting by designation.

denied him a building permit. Mongeau alleged, *inter alia*, that Reid, in his official capacity, violated Mongeau's Fourteenth Amendment substantive due process rights. The district court granted judgment in favor of Reid, holding that Mongeau failed to allege that Reid engaged in behavior that shocked the conscience. We reaffirm our earlier holdings[1] that a plaintiff may prevail on a substantive due process claim only if the defendant has engaged in behavior that "shocks the conscience," and affirm the judgment in favor of Reid.

I. Background

In 1991, the City commenced eminent domain proceedings against various parcels of land. Mongeau owned three of those parcels as part of a larger tract of land. Mongeau agreed to sell the parcels to the City in exchange for $450,000 and a promise by the City that Mongeau would be able to construct a "60 ft. by 80 ft. building" on the remaining tract "in full compliance with the building code and ordinance[s] of the City of Marlborough."

In 2003, Mongeau submitted an application to the City of Marlborough Building Department to construct a 35 ft. by 40 ft. building on the tract covered by the prior settlement. Reid denied the application, citing a lack of proper frontage and access as reasons for the denial. Later in 2003, Mongeau submitted an application to build a 60 ft. by 110 ft. building on the site. Reid again rejected the application, giving as

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[1] *See, e.g., Pagán v. Calderón*, 448 F.3d 16, 32 (1st Cir.2006); *SFW Arecibo, Ltd. v. Rodríguez*, 415 F.3d 135, 141 (1st Cir.2005); *Néstor Colón Medina & Sucesores, Inc. v. Custodio*, 964 F.2d 32, 45 (1st Cir.1992) (quoting *PFZ Properties, Inc. v. Rodríguez*, 928 F.2d 28, 31-32 (1st Cir.1991)).

reasons the proposed building's lack of frontage and location on a former railway right-of-way, and Mongeau's failure to submit the plan to the Site Plan Review Committee. Mongeau appealed the rejection of the building permit to the Marlborough Zoning Board of Appeals ("ZBA"). Reid wrote a memo to the ZBA urging them to reject Mongeau's appeal. On June 16, 2003, the ZBA granted Mongeau's appeal, allowing him to build a 60 ft. by 80 ft. structure, waiving the frontage, "sideyard planting," and "minimum centerline" requirements, and granting a right-of-way. The ZBA's decision required Mongeau to submit his plans for approval by the Site Plan Review Committee and the Conservation Commission and stated that the variances granted to Mongeau would expire in one year.

Mongeau and the Site Plan Review Committee, of which Reid is a member, embarked on a long series of negotiations for the Committee's approval which required various revisions to Mongeau's building plans. Because of the delays, Mongeau sought and received extensions of his variances from the ZBA. In December 2004, Reid allegedly informed Mongeau that he had insufficient time to consider the revised site plan and suggested that Mongeau request another extension of the ZBA variance. On December 14, 2004, Mongeau applied for and received an extension until June 15, 2005. Mongeau alleges that the following day, Reid threatened to appeal the extension and told Mongeau that he would not issue a building permit for the structure.

Nevertheless, on May 23, 2005, the Site Plan Review Committee approved Mongeau's site plan. Likewise, the Conservation Commission also approved

Mongeau's site plan, subject to certain conditions. A citizens committee filed an appeal of the conditions entered by the Conservation Commission. Mongeau alleges "on information and belief" that Reid "orchestrated" this appeal. Mongeau's variance lapsed on June 15, 2005, and the ZBA refused to grant another extension.

On September 6, 2005, the Massachusetts Department of Environmental Protection rejected the citizens committee's appeal and affirmed the order of the Conservation Commission. Mongeau then applied for a building permit. On October 19, 2005, Reid denied the permit application, stating that the ZBA variance had expired and that the "property is deficient in many ways." Reid also stated that Mongeau could apply for another variance with the ZBA. Mongeau alleges that Reid's recalcitrance in refusing to issue the building permit was due to the fact that Mongeau had never offered to make an unspecified "mitigation payment" to the City of Marlborough.

On December 22, 2005, Mongeau filed suit in the Superior Court of Middlesex, Massachusetts against Defendants, seeking a declaratory judgment that he was entitled to construct his building, injunctive relief ordering the City of Marlborough to issue him a building permit, and damages arising from violations of 42 U.S.C. § 1983 and Massachusetts state law. Defendants removed the case to the United States District Court for the District of Massachusetts and moved for judgment on the pleadings pursuant to Federal Rule of Civil Procedure 12(c). The district court granted judgment in favor of Defendants on all of Mongeau's federal claims and remanded the remaining state law claims to state court. In particular, the

district court said that to state a substantive due process violation, a plaintiff needed to allege that defendants acted in a manner that shocked the conscience. The court ruled that most of Reid's alleged behavior was not so outrageous that it shocked the conscience. The court stated the allegation that Reid demanded "mitigation payments" before issuing the permit might shock the conscience, but that it was not alleged to be a common practice of the City, and as such, could not be imputed to Reid in his official capacity. As such, the court decided that Mongeau's allegations, taken as true, did not state a substantive due process claim against Reid in his individual capacity.[2] Mongeau now appeals.

II. Discussion

A. Standard of Review

We review a district court's grant of judgment on the pleadings *de novo*. *Mass. Nurses Ass'n v. N. Adams Reg'l Hosp.*, 467 F.3d 27, 31 (1st Cir.2006). We "accept all the well-pleaded facts as true, draw all reasonable inferences in favor of the nonmovant ..., and grant the motion only if it appears that the nonmovant could prove no set of facts that would entitle it to relief." *Id.*

B. The Requirements for a Substantive Due Process Claim

We have stated with "a regularity bordering on the monotonous" that to be liable for a violation of

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[2] The court also granted judgment in favor of Reid on a procedural due process claim and found that Reid was entitled to qualified immunity on claims against him in his personal capacity. Mongeau does not appeal these decisions. The court then remanded the state-law claims to the Massachusetts Superior Court.

substantive due process rights, a defendant must have engaged in behavior that is "conscience-shocking": "the substantive due process doctrine may not, in the ordinary course, be invoked to challenge discretionary permitting or licensing determinations of state or local decisionmakers, whether those decisions are right or wrong." *Pagán*, 448 F.3d at 33. We have repeatedly affirmed the use of this standard in the context of challenges to land use decisions. *See, e.g., PFZ Properties, Inc.*, 928 F.2d at 31 ("[R]ejections of development projects and refusals to issue building permits do not ordinarily implicate substantive due process. Even where state officials have allegedly violated state law or administrative procedures, such violations do not ordinarily rise to the level of a constitutional deprivation." (internal citations omitted)); *see also SFW Arecibo*, 415 F.3d at 141; *Néstor Colón*, 964 F.2d at 46.

Nevertheless, Mongeau argues that the shocks-the-conscience test is inappropriate when analyzing a substantive due process claim in the land use context, and that instead, we should use an "arbitrary and capricious" standard. Mongeau contends that the shocks-the-conscience standard is appropriate only when addressing a claim where state officials have made split-second judgments, i.e., when they have not had time to deliberate before coming to a decision to engage in the behavior that is the basis of the claim. Mongeau points to case law from other circuits which suggests that the application of the shocks-the-conscience standard to deliberate decisions by state officials is problematic. *See, e.g., Khan v. Gallitano*, 180 F.3d 829, 836 (7th Cir.1999) ("[T]he Court [in *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998),] made clear

that its shocks-the-conscience analysis was not generally applicable to all substantive-due-process claims."); *Moreland v. Las Vegas Metro. Police Dep't*, 159 F.3d 365, 372 (9th Cir.1998) ("[T]he critical consideration [in determining whether to apply the 'shocks the conscience test'] [i]s whether the circumstances are such that 'actual deliberation is practical.' " (quoting *Lewis*, 523 U.S. at 851, 118 S.Ct. 1708)). However, a closer examination of *Lewis*-the principal case relied upon by *Khan* and *Moreland*-belies Mongeau's assertion. In *Lewis*, the Supreme Court did not reject the application of the shocks-the-conscience test to deliberate decisions, but instead stated that its application would vary with the circumstances. 523 U.S. at 851, 118 S.Ct. 1708 ("[A]ttention to the markedly different circumstances of normal pretrial custody and high-speed law enforcement chases shows why the deliberate indifference that shocks in the one case is less egregious in the other."). We have never precluded a plaintiff from arguing that conduct that is the product of a deliberate and premeditated decision might be conscience-shocking whereas the same conduct might not be if it was undertaken in the heat of the moment. Ultimately such an argument would not affect our conclusion that only conscience-shocking behavior will constitute a substantive due process violation.

Mongeau also contends that our use of the shocks-the-conscience standard is justified only by a footnote in *Creative Environments, Inc. v. Estabrook*, 680 F.2d 822 (1st Cir.1982). In that case, we stated that "[w]here a state has provided reasonable remedies to rectify a legal error by a local administrative body ... current authority indicates that due process has been provided, and that section 1983 is not a means for

litigating the correctness of the state or local administrative decision in a federal forum." *Id.* at 832 n.9. Mongeau contends that this means that a substantive due process claim turns on the adequacy of state remedies, i.e., if state remedies were adequate, a substantive due process claim could only be brought when the defendant's conduct shocked the conscience.

This is a flawed reading of *Creative Environments*. First, it is more likely that footnote 9 was referring to the plaintiff's procedural due process rights; throughout the opinion, we referred to "due process" without distinguishing its procedural and substantive components. *See id.* at 831-32. Second, *Creative Environments* has not been subsequently cited by any First Circuit case for the proposition that a substantive due process claim is dependent on procedural remedies. *Cf. Chongris v. Board of Appeals*, 811 F.2d 36, 40 (1st Cir.1987) (citing *Creative Environments* for the proposition that "[w]here state procedures-though arguably imperfect-provide a suitable form of predeprivation hearing coupled with the availability of meaningful judicial review, the fourteenth amendment guarantee of procedural due process is not embarrassed" (emphasis added)). Finally, we expressly rejected this proposition in *Amsden v. Moran* when we stated: "As distinguished from its procedural cousin, then, a substantive due process inquiry focuses on 'what' the government has done, as opposed to 'how and when' the government did it." 904 F.2d 748, 754 (1st Cir.1990).

In any case, Mongeau's arguments suffer from a more fatal defect: we recently decided that the shocks-the-conscience test applied to a substantive due process claim in the land use context, *see SFW Arecibo*,

415 F.3d at 141, and we are bound by the prior panel decisions of this Court. It is true that we have recognized at least two exceptions to the rule that we must follow the precedent of this Circuit. First, we may depart from the holding of a prior panel decision if "a preexisting panel opinion is undermined by subsequently announced controlling authority, such as a decision of the Supreme Court, a decision of the en banc court, or a statutory overruling." *Eulitt v. Me. Dep't of Educ.*, 386 F.3d 344, 349 (1st Cir.2004). Second, we may deviate from a prior holding of this Circuit in "those relatively rare instances in which authority that postdates the original decision, although not directly controlling, nevertheless offers a sound reason for believing that the former panel, in light of fresh developments, would change its collective mind." *Williams v. Ashland Eng'g Co.*, 45 F.3d 588, 592 (1st Cir.1995), abrogated on other grounds by *Carpenters Local Union No. 26 v. United States Fid. & Guar. Co.*, 215 F.3d 136, 145 (1st Cir.2000). We do not find, nor does Mongeau offer, any reason why either of these exceptions to the doctrine of stare decisis should apply, and as such, we are bound by our decision in *SFW Arecibo*.

Mongeau rejoins that our precedent on this issue has been inconsistent, resulting in standards ranging from "clearly arbitrary and unreasonable," *Roberts v. City of Woonsocket*, 575 F.2d 339, 341 (1st Cir.1978) (quoting *Village Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395, 47 S.Ct. 114, 71 L.Ed. 303 (1926)), to "when some basic and fundamental principle has been transgressed that 'the constitutional line has been crossed,' " *Amsden*, 904 F.2d 748, 754 (1st Cir.1990) (quoting *Johnson v. Glick*, 481 F.2d 1028, 1033 (2d

Cir.1973)), to a "truly horrendous situation[ ]," *Néstor Colón*, 964 F.2d at 45. While we have used various incantations to describe the standard for prevailing on a substantive due process claim, we have "decline[d] the invitation to sort out so wide a variety of labels." *Amsden*, 904 F.2d at 754. "[A]lthough the yardstick against which substantive due process violations are measured has been characterized in various ways, we are satisfied that, before a constitutional infringement occurs, state action must in and of itself be egregiously unacceptable, outrageous, or conscience-shocking." *Id.*

Thus, our precedent on this issue is both clear and binding on this case: in order to state a substantive due process claim of any ilk, a plaintiff must allege behavior on the part of the defendant that is so outrageous that it shocks the conscience.

C. Mongeau's Claim

Having reaffirmed the proper standard for a substantive due process claim, we must now examine Mongeau's allegations to determine whether Reid's behavior shocks the conscience. The district court determined that nearly all of Mongeau's allegations-that Reid had denied his building permit and interfered in the zoning process for improper reasons-failed to shock the conscience. We agree. We rejected a similar claim in *Licari v. Ferruzzi*, where the plaintiffs alleged that "hostility and animus" motivated the revocation of a building permit and the issuance of certain enforcement orders. 22 F.3d 344, 349 (1st Cir.1994). In the past, we have indicated that one of the problems with adjudicating claims of "bias" or "animus" in the zoning context is that "[e]very appeal by a disappointed developer from an adverse ruling by a local ... planning board necessarily involves some

claim that the board exceeded, abused or 'distorted' its legal authority in some manner, often for some allegedly perverse (from the developer's point of view) reason." *Creative Env'ts*, 680 F.2d at 833. For that reason, we have generally been hesitant "to involve federal courts in the rights and wrongs of local planning disputes" unless there is a "truly horrendous situation [ ]." *Néstor Colón*, 964 F.2d at 45. Taking all of Mongeau's allegations as true, we do not see such a conscience-shocking situation; we can discern nothing more than a run-of-the-mill dispute between a developer and a town official.

The district court hinted that Mongeau might have stated a substantive due process claim inasmuch as he alleged that his permit was denied because he had failed to offer a "mitigation payment" to the City of Marlborough. In *Néstor Colón*, we suggested that it was possible that bribery or threats could constitute a substantive due process violation. *Id.* at 47. However, at oral argument, counsel for Mongeau made it clear that he was not alleging that the City or Reid was seeking a "bribe."[3] If Mongeau believes that the City or Reid has wrongly charged or demanded too much for his building permit, he may find recourse in other

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[3] In a particularly confusing exchange at oral argument, Mongeau's counsel stated that while Reid did not demand a bribe of any sort, the permit was not approved because Mongeau did not offer a "mitigation payment," which counsel insinuated was improperly demanded by the city. We still do not understand what Mongeau's purported "mitigation payment" is, but we take counsel at his word that it would not constitute a "bribe" within the meaning of *Néstor Colón*. Accordingly, we see no need to address the argument advanced by the district court that Reid's conduct did not form part of a pattern or common practice of the City.

laws, but not in the substantive component of the Due Process Clause of the Fourteenth Amendment. Such conduct, without more, cannot be said to transgress "some basic and fundamental principle ... [such] that 'the constitutional line has been crossed' " and our conscience is shocked. *Amsden*, 904 F.2d at 754.

III. Conclusion

For the foregoing reasons, we affirm the judgment of the district court.

Affirmed.

Appendix B–1

Civil Action No. 06-10324-WGY

UNITED STATES DISTRICT COURT,
DISTRICT OF MASSACHUSETTS

EUGENE MONGEAU,

Plaintiff,

v.

CITY OF MARLBOROUGH, and
STEPHEN REID, individually and in
his official capacities as Commissioner of
Inspectional Services and as
member of the City of Marlborough
Site Plan Review Committee,

Defendants.

Nov. 13, 2006

YOUNG, District Judge.

This lawsuit emanates from a land developer's frustration with his inability to secure a permit to construct a building on a parcel. In 1991, the City of Marlborough ("Marlborough") announced its intention to condemn several parcels owned by Eugene Mongeau ("Mongeau"). Mongeau agreed to sell several parcels to Marlborough while retaining, among other properties, a landlocked parcel. In return, Marlborough granted Mongeau a right of way and permission to build on the property in compliance with the building code. Since 2003, Mongeau has sought a permit to build on the

landlocked parcel, but his permit application has been denied, principally on the ground that the parcel lacks road frontage. After three years of frustration, Mongeau brought suit against Marlborough and Stephen Reid ("Reid"), Commissioner of Inspectional Services and member of the Site Plan Review Committee. Marlborough and Reid moved for judgment on the pleadings under Federal Rule of Civil Procedure 12(c).

I. DISCUSSION

A. Prior Proceedings

On December 22, 2005, Mongeau filed his Complaint [Doc. No. 5] in the Massachusetts Superior Court sitting in and for the County of Middlesex. The Complaint asserted six counts: (1) request for declaratory judgment declaring the rights and responsibilities of the parties pursuant to the purchase and sale agreement between the parties; (2) breach of contract; (3) request for injunctive relief ordering defendants to authorize issuance of building permit; (4) breach of covenant of good faith and fair dealing; (5) violation of 42 U.S.C. section 1983; and (6) violation of the Massachusetts Civil Rights Act, Massachusetts General Laws, chapter 12, sections 11H, 11I. On February 22, 2006, Marlborough and Reid removed this action to this Court [Doc. No. 1]. On April 24, 2006, the defendants filed their Answer [Doc. No. 7].

On August 14, 2006, the defendants filed a Motion for Judgment on the Pleadings [Doc. No. 15] ("Defs.' Mot."). On September 1, 2006, Mongeau filed his opposition to the motion [Doc. No. 19] ("Pl.'s Opp'n"). On September 13, 2006, the defendants filed

their reply [Doc. No. 21]. On September 28, 2006, following a hearing, the Court dismissed Mongeau's section 1983 claim. The Court remanded Mongeau's remaining state law claims to the Massachusetts Superior Court [Doc. No. 22]. The Court here explains its reasoning.

B. Alleged Facts

The facts below are taken from the Complaint and all reasonable inferences were drawn in the light most favorable to Mongeau for purposes of the motion.

1. The Purchase and Sale Agreement

In 1991, the Mayor of Marlborough approved an order of taking adopted by the City Council of Marlborough to commence eminent domain proceedings for the purpose of acquiring property on which to locate a fire station. Compl. ¶ 1. Three of the parcels taken were then owned by Mongeau. *Id.* ¶ 2. The land comprising the parcels was part of a larger tract of land owned by Mongeau, a portion of which was contaminated and determined by the Department of Environmental Protection ("DEP") to require clean up. *Id.* ¶ 4.

In conjunction with the taking, Mongeau and Marlborough entered into a purchase and sale agreement. *Id.* ¶ 7. Mongeau agreed to transfer the three clean parcels to Marlborough and keep the contaminated portions of the land. *Id.* Mongeau received $450,000 in consideration. *Id.* The parties further agreed that Mongeau "shall have the right to develop parcel 140 ... and erect a 60[ft.] by 80[ft.] building thereon, in full compliance with the building

code and ordinance of the City of Marlborough." Compl. Ex. A. Since parcel 140 did not have road frontage, Marlborough agreed to provide a right of way. *Id.* ¶ 9, Ex. A. Finally, Mongeau agreed to release and discharge Marlborough from all claims and damages resulting from the taking. *Id.*

As contemplated and written, the contract gave Mongeau a zoning variance. *See Id.* at Ex. A. Although Mongeau agreed to develop the parcel in compliance with Marlborough's building codes and ordinances, the contract waived the requirement that Mongeau comply with the minimum road frontage requirement. *See id.* Under the agreement, the right of way that Marlborough provided Mongeau would provide sufficient access to the parcel. Mongeau agreed to comply with all other provisions of the building code. *Id.*

2. The Permitting Process

In reliance on the contract, Mongeau incurred $675,000 in cleaning up the contaminated parcel before he could develop the property. *Id.* ¶ 11. In late 2002 or early 2003, Mongeau submitted an application to Marlborough's Building Department for the construction of a 35 ft. by 40 ft. building. *Id.* ¶ 12.

On or around January 23, 2003, Reid, as Commissioner of Inspectional Services, rejected the application, citing the lack of proper frontage and access. *Id.* ¶ 13. That spring, Mongeau submitted a preliminary application for the construction of a 60 ft. by 110 ft. building on the site. *Id.* ¶ 14. On April 1, 2003, Reid rejected the application on the grounds of frontage and access, and also because the Site Plan

Review Committee had not considered the plan. *Id.* ¶ 15, Ex. D.

Mongeau appealed to Marlborough's Zoning Board of Appeals and submitted a request for a variance from the frontage requirements. *Id.* ¶ 16. Reid urged the Zoning Board of Appeals to reject the application on the ground that Mongeau had already been "fully compensated" for the taking. *Id.* ¶ 17, Ex. E. Reid also stated that he had no intention of ever issuing a building permit for the proposed structure because such a structure cannot be erected on the parcel. *See id.* at Ex. E.

On June 16, 2003, the Zoning Board of Appeals waived the minimum frontage requirement and granted Mongeau the right to construct a 60 ft. by 80 ft. structure on the parcel. *Id.* ¶ 18, Ex. F. As a condition, however, the Zoning Board of Appeals required Mongeau to go before the Site Plan Review Committee, of which Reid is a member, and the Conservation Committee. *Id.* at Ex. F. The site plan review process provided for no public hearing on an application and did not contain procedural safeguards to protect applicants from discriminatory practices on behalf of committee members. *Id.* ¶¶ 23-24.

Mongeau sought and received an extension of the variance up to and including December 15, 2004. *Id.* ¶ 26. Before that date, Mongeau submitted a site plan that addressed every issue that had been raised by the Department of Public Works, the building inspector, the planning director, and all other members of the site plan review committee. *Id.* ¶ 27. At that time, Reid informed Mongeau's *representative* that

Mongeau should request another extension of the variance to enable Reid to consider the site plan and issue a building permit prior to the expiration of the variance. *Id.* ¶ 28. Mongeau applied for and received an extension of the variance. *Id.* ¶ 29. Reid immediately threatened to appeal the extension of the variance in order to coerce Mongeau into refraining from pursuing development of the property. *Id.* ¶ 30.

Mongeau finally obtained site plan approval and, on May 23, 2005, a site plan permit was issued for the property. *Id.* ¶ 32. Also on that date, Mongeau obtained an order of conditions from the Conservation Committee. *Id.* A citizen's group, however, then filed an appeal of the order of conditions in accordance with the Wetlands Protection Act. *Id.* ¶ 33. Reid helped orchestrate the citizen's appeal for the sole purpose of delaying construction until the variance expired, which it did on June 15, 2004 after Mongeau was unable to secure yet another extension. *See id.* ¶ 34.

On September 6, 2005, the DEP issued an order determining that the proposed project adequately protected the interests of the Wetlands Protection Act. *Id.* ¶ 35. Mongeau immediately applied for a building permit authorizing the construction of a 4800 square foot commercial building on the property. *Id.* ¶ 36. On October 19, 2005, Reid rejected the application on the conclusory ground that the property was "deficient in many ways" and because the variance had run. *Id.* ¶ 37, Ex. G.

Mongeau alleged in the Complaint that Reid blocked the property's development because Mongeau never offered to pay "mitigation." *Id.* ¶ 41. He argues

that Reid's actions were consistent with Marlborough's practice of collecting "mitigation" payments as a condition of issuing authorizations for construction projects. *Id.*

C. Standard for Analysis

The standard for evaluating a motion for judgment on the pleadings under Fed.R.Civ.P. 12(c) is essentially the same as that for deciding a Rule 12(b)(6) motion. *Pasdon v. City of Peabody*, 417 F.3d 225, 226 (1st Cir.2005). Courts "view the facts contained in the pleadings in the light most flattering to the nonmovants ... and draw all reasonable inferences therefrom in their favor." *Aponte-Torres v. University of Puerto Rico*, 445 F.3d 50, 54 (1st Cir.2006). A court may enter judgment "only if the uncontested and properly considered facts conclusively establish the movant's entitlement to a favorable judgment." *Id.* Courts may "draw upon documents annexed to the ... complaint or incorporated into it, as well as matters subject to judicial notice." *Id.* at 55. "[B]ald assertions, unsupportable conclusions, periphrastic circumlocutions, and the like" are not credited. *Id.* (citation omitted).

D. Section 1983 Claim

There are two essential elements of a section 1983 claim: (1) the conduct complained of was carried out under color of state law; and (2) this conduct deprived the plaintiff of rights, privileges, or immunities secured by the Constitution or laws of the United States. *See Chiplin Enters., Inc. v. City of Lebanon*, 712 F.2d 1524, 1526-27 (1st Cir.1983) (citing

Parratt v. Taylor, 451 U.S. 527, 535, 101 S.Ct. 1908, 68 L.Ed.2d 420 (1981)).

In the Complaint, Mongeau alleged only that Reid "caused Mongeau to be subjected to a deprivation of his rights secured by the [C]onstitution and laws of the United States." Compl. ¶ 49. Mongeau did not specify in the Complaint which of his rights were violated. Subsequently, however, Mongeau explicated the grounds for his section 1983 claim. Mongeau explained in his opposition to the motion for judgment on the pleadings that he was alleging "violations, inter alia, of his property rights and due process rights." Pl.'s Opp'n at 12. At the hearing, Mongeau further clarified that he was alleging violations of procedural due process and substantive due process. Tr. 4:4-5.[1]

1. Land-Use Disputes and Section 1983

The First Circuit has expressed deep reservations about section 1983 claims brought in cases involving land-use disputes. The First Circuit's concern is that without a high bar to such claims, federal courts would "sit as a 'zoning board of appeals' ... [involved] in political disputes better left to local governments." *Nestor Colon Medina & Sucesores, Inc. v. Custodio*, 964 F.2d 32, 46 (1st Cir.1992) (quoting

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[1] The Court notes that no party briefed the merits of the section 1983 claim. As the First Circuit has explained, courts cannot be expected to "do counsel's work, create the ossature for the argument, and put flesh on its bones." *Redondo-Borges v. United States Dep't of Housing and Urban Dev.*, 421 F.3d 1, 6 (1st Cir.2005) (quoting *United States v. Zannino*, 895 F.2d 1, 17 (1st Cir.1990)). The Court nonetheless found guidance in the First Circuit's well-established precedent in section 1983 claims involving land-use disputes.

Village of Belle Terre v. Boraas, 416 U.S. 1, 13, 94 S.Ct. 1536, 39 L.Ed.2d 797 (1974) (Marshall, J., dissenting)). The court has observed:

> Every appeal by a disappointed developer from an adverse ruling by a local ... planning board necessarily involves some claim that the board exceeded, abused or "distorted" its legal authority in some manner, often for some allegedly perverse (from the developer's point of view) reason. It is not enough simply to give these state law claims constitutional labels such as "due process" or "equal protection" in order to raise a substantial federal question under section 1983.

Cloutier v. Town of Epping, 714 F.2d 1184, 1189 (1st Cir.1983) (quoting *Creative Env'ts, Inc. v. Estabrook*, 680 F.2d 822, 833 (1st Cir.1982)). With these policy concerns in mind, the Court addresses, in turn, Mongeau's procedural due process and substantive due process claims.

2. Procedural Due Process

To establish a procedural due process claim under section 1983, a plaintiff "must allege first that it has a property interest as defined by state law and, second, that the defendants, acting under color of state law, deprived it of that property interest without constitutionally adequate process." *SFW Arecibo, Ltd. v. Rodriguez*, 415 F.3d 135, 139 (1st Cir.2005) (citation omitted).

In section 1983 claims brought in the context of land-use disputes, the First Circuit has invariably

assumed arguendo that there was a property interest and examined whether there was sufficient process afforded the would-be property developers. *See, e.g., id.* This Court followed that approach and assumed for purposes of this motion that Mongeau had a property interest in order to reach the question whether there was adequate process.

The First Circuit has declared that "where ... the state offers a panoply of administrative and judicial remedies, litigants may not ordinarily obtain federal court review of local zoning and planning disputes by means of 42 U.S.C. § 1983." *Raskiewicz v. Town of New Boston*, 754 F.2d 38, 44 (1st Cir.1985); *see also Chongris v. Board of Appeals of the Town of Andover*, 811 F.2d 36, 41-42 (1st Cir.1987). Even a bad faith refusal to follow state law in local administrative matters does not amount to a deprivation of due process where the state courts are available to correct the error. *See Chiplin*, 712 F.2d at 1528.

The First Circuit has affirmed the adequacy of the post-deprivation remedies available under Massachusetts zoning law. In *Licari v. Ferruzzi*, 22 F.3d 344 (1st Cir.1994), the court stated that the developer had "the right to an administrative appeal of the building inspector's decision, which could have been heard by the zoning board of appeals or by the state Building Code Appeals Board, and a right to judicial review thereafter." *Id.* at 348 (citing 22 Mass. Regs.Code tit. 780, §§ 126.1, 126.6 and 126.7.1). The court also rejected the developer's argument that the remedies were insufficient because relief might be delayed. *Id.* (noting that the Appeals Board adheres to

a timetable as required by 22 Mass. Regs.Code tit. 780, §§ 126.3.4, 126.4.3).

The First Circuit has further explained that "[f]ull judicial-type hearings are not required when local boards engage in the quasi-legislative task of granting or revoking zoning or similar types of permits." *Chongris*, 811 F.2d at 41 (quoting *Cloutier*, 714 F.2d at 1191) (alterations in original). The court explained that "[t]hese truths are especially self-evident where ... the state's courts were available to provide post-deprivation review." *Id.* (citing *Raskiewicz*, 754 F.2d at 44).

In the present case, Mongeau alleged that Reid forced him to seek relief from the Zoning Board of Appeals and undergo site plan approval for the building. Mongeau further alleges that Reid orchestrated an appeal of the Conservation Committee order. Taken together, these allegations suggest that Mongeau's complaint is that he never should have had to try to overcome any of the bureaucratic hurdles that were placed before him. State law, however, appears to provide for the administrative procedures in question[2]. Short of contending that the procedures required or permitted by state law are themselves unconstitutional, Mongeau cannot prevail on the theory that his due process rights were violated because he had to go through an administrative process in an effort to seek a variance.

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[2] For instance, a zoning board of appeals may grant a variance. Massachusetts General Laws, ch. 40A, § 14(3). Similarly, state law provides for a site plan review process. *Id.* § 9. In any event, Mongeau does not allege that these procedures were unauthorized under state law.

Mongeau also alleged that Reid had predetermined that the property could not be developed and did everything he could to block the project. Compl. ¶ 40. *Chiplin* makes clear, however, that even a bad faith refusal to follow state law in local administrative matters does not amount to a deprivation of due process when state courts are available to correct the error. 712 F.2d at 1528.

Mongeau further alleged that the site plan review process he had to undergo as a condition for receiving the variance was procedurally defective. Compl. ¶¶ 22-24. The site plan review process allegedly provided for no public hearing on a site plan review application. *Id.* ¶ 23. As described, however, the First Circuit has explained that full judicial-type hearings are not required when judicial review is available. *Chongris*, 811 F.2d at 41 (quotation omitted). That Mongeau filed suit in state court shows that procedures remain available under state law for him to vindicate any property interest that he may have. First Circuit precedent establishes the sufficiency of administrative and judicial review provided under Massachusetts law and Mongeau did not allege otherwise. *See Licari*, 22 F.3d at 347-48.

In short, Mongeau did not establish anything to show that his case was any different from the run-of-the-mill case where a frustrated developer brings suit under section 1983 to try to overcome the bureaucratic red tape that is perhaps inherent in land-use regulatory processes. Without anything to distinguish his case, Mongeau failed to state a procedural due process claim.

3. Substantive Due Process

The doctrine of substantive due process "prevents governmental power from being used for purposes of oppression, or abuse of government power that shocks the conscience, or action that is legally irrational in that it is not sufficiently keyed to any legitimate state interests." *SFW Arecibo*, 415 F.3d at 141 (quoting *PFZ Props. v. Rodriguez*, 928 F.2d 28, 31-32 (1st Cir.1991)). Unlike with a procedural due process claim, there is no requirement that Mongeau establish that he has a property right. Rather, the focus is on the governmental action in and of itself. *Amsden v. Moran*, 904 F.2d 748, 753 (1st Cir.1990).

The First Circuit has explained that "[it] has repeatedly held ... that rejections of development projects and refusals to issue building permits do not ordinarily implicate substantive due process. Even where state law officials have allegedly violated state law or administrative procedures, such violations do not ordinarily rise to the level of a constitutional deprivation." *SFW Arecibo*, 415 F.3d at 141 (quoting *PFZ Props.*, 928 F.2d at 31).

The First Circuit "[has] left the door slightly ajar for federal relief in truly horrendous situations. But ... the threshold for establishing the requisite 'abuse of government power' is a high one indeed." *Nestor Colon Medina*, 964 F.2d at 45. An allegation of political interference with the permitting process alone does not give rise to a substantive due process claim. *Id.* at 46. Similarly unavailing are substantive due process claims based on an "erroneous decision in violation of state law." *SFW Arecibo*, 415 F.3d at 141.

The First Circuit has, however, not ruled out the possibility of a substantive due process claim based on personal hostility towards the applicant. *Nestor Colon Medina*, 964 F.2d at 47 & n. 6 (declining to take a position whether such allegations sufficed). The court has also left open the possibility of a substantive due process claim where bribery or political threats are involved. *Id.* at 47 ("Whether and in what circumstances such conduct might violate the due process clause is an issue we need not and do not consider."). Similarly, the First Circuit has declined to consider whether "sufficiently serious, supported, assertions" of conspiracy and corruption can make out a due process claim under section 1983. *Raskiewicz*, 754 F.2d at 44-45. Although the First Circuit has left the door slightly ajar, it has expressed doubt about even these kind of claims, since "[i]f all that were required to secure federal jurisdiction were loose claims of conspiracy and corruption, virtually any case of this type could be brought into the federal court." *Id.* at 44.

Thus, even assuming that some or all of the procedures Reid employed violated state law, First Circuit precedent holds that in the context of land-use disputes, such conduct "do[es] not ordinarily rise to the level of a constitutional deprivation." *SFW Arecibo*, 415 F.3d at 141. Consequently, without more, Mongeau's allegations that Reid raised unlawful barriers to the development of the property fails to state a claim.

Mongeau did, however, make the additional allegation that Reid "made every effort" to prevent him from receiving a permit because Mongeau "never

offered to pay 'mitigation' to the City of Marlborough in accordance with the unlawful practice of the City of Marlborough officials of collecting 'mitigation' payments as a condition of issuing approvals authorizing construction projects in the City." Compl. ¶ 41. If Reid refused to grant a permit because Mongeau did not make a "mitigation payment," then his conduct would appear to be "abuse of government power that shocks the conscience." *See SFW Arecibo*, 415 F.3d at 141.

Since Mongeau alleged that Reid was determined to block him because Mongeau never offered mitigation payments, Mongeau may have stated a claim under section 1983. This is not, however, the end of the substantive inquiry. Mongeau must also surmount the immunity defenses that Marlborough and Reid have asserted in this case.

4. Immunity Defenses

As an initial matter, Marlborough and Reid contended that Mongeau was not sufficiently specific as to which of Reid's capacities he challenged. Defs.' Mot. at 12. The First Circuit, however, has adopted a "course of proceedings" test whereby the identification of the capacity in which a governmental actor is sued is not limited solely to the face of the complaint but may be determined from the course of the proceedings. *Powell v. Alexander*, 391 F.3d 1, 22 (1st Cir.2004). Since Mongeau's Complaint and Memorandum of Opposition can be read to allege suit against Reid in both his official and individual capacities, the following analysis proceeds with respect to both capacities.

a. Reid's Personal Capacity

Federal law governs immunity in actions based on federal law. Under the standard set out in *Harlow v. Fitzgerald*, 457 U.S. 800, 102 S.Ct. 2727, 73 L.Ed.2d 396 (1982), "government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818, 102 S.Ct. 2727. The Supreme Court has explained that a right can be "clearly established" even in the absence of a Supreme Court opinion on point, but that a conflict in the lower courts might preclude such a determination. *See Wilson v. Layne*, 526 U.S. 603, 617-18, 119 S.Ct. 1692, 143 L.Ed.2d 818 (1999); *United States v. Lanier*, 520 U.S. 259, 269; 117 S.Ct. 1219, 137 L.Ed.2d 432 (1997).

In the immediate case, Mongeau may have a viable claim that his constitutional rights were violated. As discussed, the First Circuit has left the door slightly ajar in substantive due process claims in land-use actions involving allegations of corruption or bribery. Given that the First Circuit has explicitly refused to decide whether such an allegation can make out a section 1983 claim, such a right is not "clearly established." Consequently, as counterintuitive as it may seem, Reid is entitled to qualified immunity even if he required mitigation payments in order to grant a permit. This is the logical conclusion that must follow from *Harlow* and the First Circuit opinions discussing section 1983 in the context of land-use disputes. This qualified immunity follows in the wake of the First

Circuit's express reluctance to recognize any type of section 1983 claim in this particular context.

b. Reid's Official Capacity

In an official capacity suit, the plaintiff "must look to the government entity itself" since that entity is the "real party in interest." *Kentucky v. Graham*, 473 U.S. 159, 166, 105 S.Ct. 3099, 87 L.Ed.2d 114 (1985). In *Graham*, the Supreme Court explained that there is no need to bring an official capacity suit against a municipal officer because a municipality may be sued directly. *Id.* at 167 n. 14, 105 S.Ct. 3099. Consequently, the theory of municipal liability is applicable even though the section 1983 claim is nominally against Reid and not Marlborough.

Under the rule of *Monell v. Department of Soc. Servs.*, 436 U.S. 658, 690, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978), a municipality may be sued directly under section 1983 for damages or for declaratory or injunctive relief where "the action that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, or decision officially adopted and promulgated by that body's officers." In the present case, Mongeau alleged in the Complaint that Marlborough has a custom of requiring mitigation payments before a permit can issue. Compl. ¶ 41.

There are two requirements for maintaining a section 1983 action grounded upon an unconstitutional municipal custom: (1) "the custom .... must be so well settled and widespread that the policymaking officials ... can be said to have either actual or constructive knowledge of it yet did nothing to end the practice";

and (2) "the custom must have been the cause of and the moving force behind the deprivation of constitutional rights." *Bordanaro v. McLeod*, 871 F.2d 1151, 1156 (1st Cir.1989).

With respect to the first prong, state law determines who is a policymaking official. *Jett v. Dallas Indep. Sch. Dist.*, 491 U.S. 701, 737, 109 S.Ct. 2702, 105 L.Ed.2d 598 (1989). In this case, Mongeau can recover under a theory of municipal liability only if he can establish that a policymaking official caused the deprivation of his rights or acquiesced in the longstanding practice or custom. *See id.* This inquiry is a fact-specific one, however, and the parties did not brief this issue. Presumably, Mongeau imagines that Reid is a policymaking official as either Commissioner of Inspectional Services or as member of the Site Plan Review Committee.

Even assuming that Reid is a policymaking official, Mongeau must further make out a custom that resulted in the deprivation of his rights. Under some circumstances, extortion can represent a "custom" within the meaning of *Monell* as construed by later cases. In *Roma Constr. Co. v. aRusso*, 96 F.3d 566 (1st Cir.1996), the First Circuit stated that, based on the facts in the case, municipal liability was possible if "extortion of outsiders, businessmen, or developers ... was 'the way things are done and have been done' in the Town." *Id.* at 576 (internal citation omitted). On its face, this appears to require an even more extraordinary showing of bribery than may suffice to make out a substantive due process claim. Mongeau would have to show not just that Reid refused to grant him a permit because he did not offer to pay mitigation

but also that extortion is "the way things are done and have been done" in Marlborough.

5. Disposition of the Section 1983 Claim

For the reasons described, there is only one way that Mongeau can prevail on a section 1983 claim. Assuming that Reid is in fact a policymaking official, Mongeau may be able to reach Reid in his official capacity if extortion is the way business is done in Marlborough and Reid denied Mongeau's permit applications because Mongeau did not pay a bribe.

The allegation of bribery is a serious one, especially if proven true. Mongeau, however, alleged bribery almost as an afterthought in his Complaint and did not integrate the extortion allegation into his legal argument. At the hearing, the Court questioned Mongeau's attorney, Catherine Savoie, Esq., about this allegation:

> The Court: Given your responsibilities under Rule 11, I don't hear you saying that you're claiming that bribery is a way that Marlborough conducts business.
> Ms. Savoie: Well, your Honor, I think that that is-I would not use the word bribery, but I would say that as reported in the Marlborough newspaper and as discussed by the city council in open meetings, they're very concerned about their practice of mitigation packages. Put it that way. They have indicated and it's been reported in the newspapers that I've read that they believe that they've gotten

> advice that their practice of requiring or accepting mitigation packages is an unlawful practice and they want, and they recognize that they need to do something about it.
>
> Now, at the time of these events that recognition had not been made yet. But at the time of these events we intend to prove that there were typically mitigation packages offered and accepted. Now, I don't know that I want to say that that's bribery, your Honor.

Tr. 5:10-6:2.

The Court appreciated counsel's candor in declining explicitly to allege that bribery was the way business was done in Marlborough at the time of the alleged acts. In light of counsel's express reluctance to press the assertion of extortion when reminded of her Rule 11 obligations, this Court held that Mongeau did not make his allegation in the sufficiently serious and supported manner required to make out a section 1983 claim in the land-use dispute context, to the extent that such a claim is cognizable. *See Raskiewicz*, 754 F.2d at 44-45. Without more than loose allegations of bribery, Mongeau's section 1983 claim cannot stand.

II. CONCLUSION

There is nothing in this record to "distinguish it sufficiently from the usual land developer's claim under state law to warrant recognition of a federal constitutional question." *SFW Arecibo*, 415 F.3d at 137

(quoting *Creative Env'ts*, 680 F.2d at 833). Consequently, the Court dismissed the section 1983 claim and remanded the remaining state law claims to the Massachusetts Superior Court. Accordingly, the Motion for Judgment on the Pleadings [Docket No. 15] was ALLOWED in part and DENIED in part.

Appendix C–1

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

August 17, 2007

Mr. J. David Breemer
Pacific Legal Foundation
3900 Lennane Drive
Suite 200
Sacramento, CA 95834

Re: Eugene Mongeau v.
City of Marlborough, Massachusetts, et al.
Application No. 07A127

Dear Mr. Breemer:

The application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case has been presented to Justice Souter, who on August 17, 2007 extended the time to and including October 20, 2007.

Appendix C–2

This letter has been sent to those designated on the attached notification list.

Sincerely,

William K. Suter, Clerk

by /s/ Ruth Jones
Case Analyst

Appendix C–3

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

William K. Suter
Clerk of the Court
(202) 479-3011

NOTIFICATION LIST

Mr. J. David Breemer
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3900 Lennane Drive
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Clerk
United States Court of Appeals for the First Circuit
United States Courthouse
1 Courthouse Way
Boston, MA 02210

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(2)

FILED
NOV 21 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 07-533

IN THE

Supreme Court of the United States

EUGENE MONGEAU,
Petitioner,

v.

CITY OF MARLBOROUGH AND STEPHEN REID,
INDIVIDUALLY AND AS COMMISSIONER OF
INSPECTIONAL SERVICES AND AS A MEMBER OF
THE CITY OF MARLBOROUGH SITE
PLAN REVIEW COMMITTEE,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

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November 21, 2007

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

QUESTION PRESENTED

Whether the First Circuit Court of Appeals, reaffirming its earlier holdings, properly ruled that a plaintiff in a land-use dispute must prove that a defendant engaged in behavior that "shocks the conscience" in order to prevail on a substantive due process claim and that this standard had not been met here?

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RESPONSE TO PETITIONER'S STATEMENT OF CONSTITUTIONAL PROVISIONS AT ISSUE

The Petitioner, Eugene Mongeau, lists the Fourteenth Amendment as the constitutional provision involved in this case. He, however, made no reference to this Amendment in his complaint and did not invoke the words "due process" therein. It was only subsequently that Mongeau explicated the grounds for his section 1983 claim, informing the United States District Court for the District of Massachusetts at a hearing that he was alleging procedural and substantive due process violations.

INTRODUCTION

The Respondents, City of Marlborough and Stephen Reid, Individually and as Commissioner of Inspectional Services and as a Member of the City of Marlborough Site Plan Review Committee, respectfully ask this Honorable Court to deny the certiorari petition. A Petition for a Writ of Certiorari, just recently before this Court in the matter of *Eichenlaub v. Township of Indiana, Pa.*, __ U.S. __, 128 S.Ct. 201 (U.S. Oct. 01, 2007), presented the very same issue as that here, and likewise claimed a split in the circuits over application of the "shocks the conscience" standard discussed in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). The Respondents in *Eichenlaub* opposed the Petition, refuting therein the Petition's claim of a division among circuit courts that called for this Court's intervention. This Court denied the *Eichenlaub*

Petition on October 1, 2007. This issue then has just recently been briefed to this Court. The Respondents incorporate much of the *Eichenlaub* Opposition here. As in *Eichenlaub*, the Petition here should be denied.

Indeed, as in *Eichenlaub,*

1. The Petition here does not mention or challenge this Court's application of the "shocks the conscience" standard enunciated in *Lewis* to a land use case in *City of Cuyahoga Falls v. Buckeye Community Hope Foundation,* 538 U.S. 188, 198-199 (2003).

2. The Courts of Appeals' application of *Lewis* to substantive due process claims in land-use cases does not conflict with but rather implements this Court's precedents.

3. Current Supreme Court and Circuit case law provides no support for petitioner's suggestion that some other test should apply and refutes his specter of a "disarray, "conflict" or "intra-circuit confusion" in the Circuits on the issue.

Additionally, while the Petitioner, in the "Introduction" to his Petition, says this dispute arises from his "ultimately unsuccessful attempts to secure a valid building permit" and that he brought legal action as "a last resort," the fact is that his claim is not ripe. The Petitioner did not pursue a final decision regarding the application of the subject zoning ordinance and regulations to his property –

even though he had recourse via the Zoning Board of Appeal in terms of appealing the denial of his permit or reestablishing his variance.

Also, the United States District Court for the District of Massachusetts recited and applied the First Circuit's substantive due process law in dismissing the plaintiff's federal claim. The Petitioner never even argued to that Court that some other standard should apply.

COUNTERSTATEMENT OF THE CASE

A. Facts

The relevant facts are stated in the opinions of the First Circuit Court of Appeals and the United States District Court for the District of Massachusetts, both of which appear in the Appendix to the Petition for Writ of Certiorari. Respondents direct this Court's attention to the same, and submit that the Statement of Facts in the Petition miscasts or omits mention of key points, including the following:

1. In 1991, Mongeau had agreed to sell three parcels of land to the City in exchange for $450,000 and an acknowledgement by the City that Mongeau would be able to construct a "60 ft. by 80 ft. building" on a remaining tract "in full compliance with the building code and ordinance[s] of the City of Marlborough." Appendix A-2.

2. Some twelve years later, in 2003, Mongeau submitted an application to the Building Department to construct a 35 ft. by 40 ft. building on the subject tract. Respondent Reid denied the application, citing a lack of frontage and access as reasons. Appendix A-2.

3. Later that year, Mongeau submitted an application to build a 60 ft. by 100 ft. building on the site. Respondent Reid rejected the application, citing the building's lack of frontage and location on a former railroad right-of-way, and Mongeau's failure to submit the plan to the Site Plan Review Committee. Appendix A-3.

4. Mongeau appealed this second rejection of his application to the City's Zoning Board of Appeals ("ZBA"). Appendix A-3. In a memorandum, Respondent Reid expressed concern that the plaintiff's proposal sought substantial relief from the Zoning Ordinance.

5. In June 2003, the ZBA waived the minimum frontage requirement and granted Mongeau the right to construct a 60 ft. by 80 ft. structure on his property. This decision required that Mongeau submit his plans for approval by the Site Plan Review Committee and the Conservation Commission and stated that the variances granted to Mongeau would expire in one year. Appendix A-3.

6. Mongeau sought and received extensions of his variances from the ZBA (up to and including June 15, 2005) while he awaited approvals

from the Site Plan Review Committee and the City's Conservation Commission. Appendix A-3.

7. On May 23, 2005, Mongeau received final approval of the site plan from the Site Plan Review Committee and the City's Conservation Commission. Appendix A-3. The Conservation Commission's approval, however, was subject to certain conditions. Appendix A-3, 4. Reid was not a member of the Conservation Commission.

8. A citizen's group appealed the Conservation Commission's order of conditions to the Massachusetts Department of Environmental Protection ("DEP").[1]

9. Mongeau's variance lapsed on June 15, 2005, and the ZBA did not grant another extension. Appendix A-4.

10. On September 6, 2005, the Massachusetts DEP rejected the citizen's group appeal and affirmed the order of the Conservation Commission. Appendix A-4. Mongeau then applied for a building permit.

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[1] In his complaint, Mongeau alleged "[o]n information and belief" that Reid had "orchestrated" this appeal. Appendix A-4. A mere allegation that a plaintiff is "informed and believes" that a fact exists is not a sufficient allegation that the fact does exist. Rather, a plaintiff must have sufficient data to justify interposing such an allegation in the first instance. *General Acc. Ins. Co. of America v. Fidelity and Deposit Co. of Maryland,* 598 F.Supp. 1223, 1231 (D.C.Pa. 1984).

11. On October 19, 2005, Respondent Reid denied the building permit, noting *inter alia* that the ZBA variance had expired. Appendix A-4. Reid specifically explained to Mongeau that if he wished to reestablish the variance he was to contact the ZBA.

12. Instead, on December 22, 2005, Mongeau filed suit in the Superior Court of Middlesex, Massachusetts, against the City and Reid, seeking a declaratory judgment that he was entitled to construct his building, injunctive relief ordering the City to issue him a building permit, and damages arising from violation of 42 U.S.C. § 1983 and Massachusetts state law. The case was removed to the United States District Court for the District of Massachusetts.[2]

B. The District Court Decision

The Respondents filed a motion for judgment on the pleadings in the United States District Court. On November 13, 2006, that Court granted judgment for the defendants on Mongeau's federal claims, and remanded the remaining state law claims to state court. Appendix B-21. Those state law claims are pending.

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[2] Contrary to Petitioner's suggestion otherwise at page 5 of the Petition, the complaint did not mention either the Due Process Clause or the Fourteenth Amendment. Further, the Respondents removed the case based on the claim under 42 U.S.C. § 1983, and not "the due process issue."

The District Court concluded that there was nothing that distinguished Mongeau's claims from the usual land developer's claim under state law to warrant recognition of a federal constitutional question. Appendix B-20. In particular, the Court said that to state a substantive due process violation, the plaintiff needed to allege that defendants acted in a manner that shocked the conscience, and that the alleged behavior was not so outrageous that it shocked the conscience.

The District Court also granted judgment in favor of Reid on his procedural due process claim and found that Reid was entitled to qualified immunity on claims against him in his personal capacity.

C. The First Circuit Decision

On appeal, although he had not raised the issue below, Mongeau argued that the test applied by the District Court to the substantive due process claim was inappropriate in the land use context and that, instead, the Court should use an "arbitrary and capricious" standard. Appendix A-6. He did not appeal the ruling in favor of the defendants on the procedural due process claims or the finding that Reid was entitled to qualified immunity on claims against him in his personal capacity. Appendix A-5, n. 2.

The First Circuit Court of Appeals reaffirmed its earlier holdings that a plaintiff may prevail on a substantive due process claim only if the defendant

had engaged in behavior that "shocks the conscience." Appendix A-10. Taking all of Mongeau's allegations as true, the Court did not see a conscience-shocking situation. It could discern nothing more than a run-of-the-mill dispute between a developer and a town official. Appendix A-11. The Court affirmed the judgment in favor of Reid.

REASONS FOR DENYING THE PETITION

I. THE PETITION FAILS TO ACKNOWLEDGE OR CHALLENGE THIS COURT'S APPLICATION OF *LEWIS* TO A LAND USE CASE IN *CUYAHOGA FALLS*.

The Petition argues that *Lewis* had no intended impact beyond "the kind of impulsive action in police cases" and that various courts have "extended *Lewis*' 'shocks the conscience' analysis" to more "deliberative" government actions. (Pet., pp. 8-9).

However, the Petition fails to acknowledge that this Court applied *Lewis* to a land use matter in *Cuyahoga Falls*, *supra*, 538 U.S. at 198-199. There, this Court stated as follows:

> "We need not decide whether respondents had a property interest in the building permits, because the city engineer's refusal to issue the permits while the petition was pending in no sense constituted egregious or arbitrary government conduct. *See County of*

> *Sacramento v. Lewis,* 523 U.S. 833, 846, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998) (noting that in our evaluations of 'abusive executive action,' we have held that 'only the most egregious official conduct can be said to be "arbitrary in the constitutional sense"')."

In *Lewis*, this Court had reiterated that the Due Process Clause was intended to prevent government officials "from abusing [their] power, or employing it as an instrument of oppression" and explained that "[t]o this end, for half a century now we have spoken of the cognizable level of executive abuse of power as that which shocks the conscience." *Lewis*, 523 U.S. at 847.

Notably, the Petition fails to even mention *City of Cuyahoga Falls* and, further, fails to appreciate that the *Lewis* standard equates "shocks the conscience" with "most egregious" and "arbitrary in the constitutional sense" and uses those terms interchangeably. As noted above, the Court's opinion in *Lewis* expressly draws that equation. So, too, does this Court's opinion in *Collins v. City of Harker Heights*, 503 U.S. 115, 128, 112 S.Ct. 1061 (1992), which involved an employee safety claim. In *Collins*, *supra*, the Court held, "We are also not persuaded that the city's alleged failure to train its employees, or to warn them about known risks of harm, was an omission that can properly be characterized as *arbitrary, or conscience shocking,* in a constitutional sense." (Emphasis added).

The First Circuit Court of Appeals is in accord with this Court's decisions in this respect. In its decision in this matter, the First Circuit reiterated that "although the yardstick against which substantive due process violations are measured has been characterized in various ways, we are satisfied that, before a constitutional infringement occurs, state action must in and of itself be egregiously unacceptable, outrageous, or conscience-shocking." Appendix A-10.

The Petition should be denied because it does not challenge the foregoing applications of the *Lewis* standard. Indeed, as indicated in the discussion below, its claims of a split in the circuits as to the proper standard to be applied disregards *Lewis* and ignores this Court's holding in *Cuyahoga Falls*.

II. CURRENT CASE LAW PROVIDES NO SUPPORT FOR THE PETITION'S CIRCUIT ANALYSIS.

As just recently detailed to this Court in the Opposition to the Petition for Writ of Certiorari in *Eichenlaub v. Township of Indiana*, *supra,* a circuit review reveals that the petition's circuit analysis is off the mark and, indeed, confirms that there is no need for intervention by this Court.

The Second Circuit

The Petition claims a "conflict" exists between the First and Second Circuits because, it contends, the Second Circuit favors a rational basis test when analyzing substantive due process claims in a land-

use context. However, the Petition cites to a case, *Walz v. Town of Smithtown*, 46 F.3d 162 (2d Cir. 1995), which pre-dates *Lewis*. It certainly, then, is not instructive on the Petition's claim of a conflict among the circuits on whether and where the *Lewis* "shocks the conscience" test controls.

In the other Second Circuit case cited, *O'Mara v. Township of Wappinger*, 485 F.3d 693 (2d Cir. 2007), the court dismissed the substantive due process claim on the ground that the plaintiff developers had no cognizable property interest under substantive due process that was violated when the town refused to grant a certificate of occupancy. As such, the Court said it was "unnecessary to reach the question of whether the Town's actions were arbitrary or irrational." *Id.* at 700.

As the Second Circuit explained in *Natale v. Town of Ridgefield*, 170 F.3d 258, 262-263 (2d Cir. 1999), which involved building and zoning permits, "[f]or state action to be taken in violation of the requirements of substantive due process, the denial must have occurred under circumstances warranting the labels 'arbitrary' and 'outrageous', specifically citing *Lewis*. That Court also underscored the limited role that substantive due process and federal courts had in state land use cases.

Moreover, the Second Circuit, in *O'Connor v. Pierson*, 426 F.3d 187, 203 (2d Cir. 2005), expressly stated that *Lewis* "did not distinguish between different types of substantive due process claims, so 'constitutionally arbitrary' action for purposes of a

property-based substantive due process claim is action that shocks the conscience."

Given the above, the Second Circuit is not in conflict with the First Circuit.

The Third Circuit

The Petition acknowledges that the Third Circuit is in accord with the First Circuit. It also acknowledges that a petition for certiorari was filed in the Third Circuit case of *Eichenlaub* to test the "shocks the conscience" approach, and that this Court just recently denied that petition.

The Fourth Circuit

To position the Fourth Circuit, the Petition cites to a case that pre-dates *Lewis*. It cannot be expected that this case would discuss or apply the *Lewis* standard. The other Fourth Circuit case cited in the Petition, *Tri-County Paving, Inc. v. Ashe County*, 281 F.3d 430 (4th Cir. 2002), recognized the extremely circumspect nature of substantive due process review in the post-*Lewis* era. That Court stated that a substantive due process claim is supported only where conduct "falls ... beyond the outer limits of legitimate governmental action." "Substantive due process protections 'run only to state action so arbitrary and irrational, so unjustified by any circumstance or government interest, as to be literally incapable of avoidance by any pre-deprivation procedural protections or of adequate rectification by any post-deprivation state remedies.'" *Id.* at 440. Again, this is in keeping with *Lewis* and *Cuyahoga Falls*, and the First Circuit.

Indeed, in *Young v. City of Mt. Rainier*, 238 F.3d 567, 574 (4th Cir. 2001), the Fourth Circuit noted the broad applicability of the *Lewis* standard, stating that "only governmental conduct that 'shocks the conscience' is actionable as a violation of the Fourteenth Amendment." More recently, in *United States v. Al-Hamdi*, 356 F.3d 564, 574 (4th Cir. 2004), the court reconfirmed that "[a]n executive action can violate substantive due process only when the act shocks the conscience."

The Fifth Circuit

The Petition asserts that the Fifth Circuit is "in direct conflict" with the First Circuit because, in assessing a substantive due process claim in *Mikeska v. City of Galveston*, 451 F.3d 376 (5th Cir. 2006), that Court determined whether the governmental action was "rationally related to a legitimate governmental interest." *Mikeska* cites to *Simi Inv. Co. v. Harris County,* 236 F.3d 240, 249 (5th Cir. 2000). In *Simi Inv.*, the Fifth Circuit stated that "[s]ubstantive due process analysis is appropriate only in cases in which government arbitrarily abuses its power to deprive individuals of constitutionally protected rights" and it specifically recognized that "reliance on substantive due process must be taken with the 'utmost care'," citing *Collins v. City of Harker Heights*, 503 U.S. 115, 125, 112 S.Ct. 1061 (1992). As noted above, in *Collins,* this Court referenced "arbitrary, or conscience shocking" behavior in "a constitutional sense."

Moreover, in *Conroe Creosoting Co. v. Montgomery County Texas*, 249 F.3d 337, 341 (5th

Cir. 2001), in which the plaintiff claimed a property right to designate property for sale, the Fifth Circuit explicitly noted that "Courts generally examine due process challenges to executive actions by asking 'whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to shock the contemporary conscience."

Consequently, the Fifth Circuit too is aligned with the First, Second, Third and Fourth Circuits.

The Sixth Circuit

The Petition cites a single post-*Lewis* case from the Sixth Circuit, *Brody v. City of Mason*, 250 F.3d 432 (6th Cir. 2001). As stated in the Petition, the *Brody* court stated that, in a land-use case, "a plaintiff must show that the state administrative agency has been guilty of 'arbitrary and capricious action' in the strict sense, meaning 'that there is no rational basis for the ... [administrative] decision'." The Court recognized that "[t]his requires a very strong showing. 'The administrative action will withstand substantive due process attack unless it 'is not supportable on any rational basis'" or is "'willful and unreasoning action, without consideration and in disregard of the facts or circumstances of the case.'" *Id.* at 438. As noted above with respect to other "strict sense" or "constitutional sense" cases, this standard does not differ from the *Lewis* standard.

Moreover, two more recent cases underscore that the Sixth Circuit follows the *Lewis* standard. In *Banks v. City of Whitehall*, 344 F.3d 550, 554-55 (6th Cir. 2003), a land-use case, the Court rejected a

substantive due process claim, because "the conduct of Whitehall officials in enforcing those codes and regulations was neither 'arbitrary' nor 'conscience-shocking' in the constitutional sense." In *Midkiff v. Adams County Regional Water District*, 409 F.3d 758, 769 (6th Cir. 2005), in addressing the plaintiffs' substantive due process claim in the context of the Water District's termination of their water service without notice, the Court explained that substantive due process claims involve allegations of "(1) deprivations of a particular constitutional right and (2) actions that 'shock the conscience.'" That Court affirmed the dismissal of the plaintiffs' complaint.

The Sixth Circuit, too, then is aligned with those discussed above, as is the Seventh Circuit.

The Seventh Circuit

The Petition cites to the Seventh Circuit case of *Centres v. Town of Brookfield*, 148 F.3d 699 (7th Cir. 1998), as indicating that the Circuit employed a rational basis test. But, the Seventh Circuit acknowledged in *Centres* that, "in order to state a substantive due process claim, a plaintiff must also allege that some other substantive constitutional right has been violated or that state remedies are inadequate.... [T]hese requirements impose substantial burdens on the plaintiff, but those burdens are appropriate. Federal courts 'are not zoning boards of appeal." *Id.* at 704. The Court found that the plaintiff's allegation that the defendants acted contrary to state law and in an arbitrary and capricious manner did not supply the essential element of a separate constitutional violation.

In most recent substantive due process cases, the Seventh Circuit has expressly applied the *Lewis* standard. *See Christianson v. County of Boone*, 483 F.3d 454, 462 n.2 (7th Cir. 2007) ("When, as in the present case, a plaintiff complains of abusive executive action, this 'conscience shocking' test determines liability, rather than the traditional strict scrutiny standard used to measure the constitutionality of legislative acts", citing *Lewis* as "clarifying this distinction."); *Montgomery v. Stefaniak*, 410 F.3d 933, 939 (7th Cir. 2005) (wrongful discharge claim) ("The scope of substantive due process ... is very limited and protects plaintiffs only against arbitrary government action that "shocks the conscience.")

The Ninth Circuit

The Petition cites two Ninth Circuit cases that pre-date *Lewis* and thus are not truly instructive. In any event, both of those cases use an "arbitrary" standard -- which *Cuyahoga Falls* equates with "conscience shocking."

As in the *Eichenlaub* petition, the Petition here also overlooks the tendency of the Ninth Circuit to heed this Court's admonition in *Lewis*, *supra*, 523 U.S. at 843, *Albright v. Oliver*, 510 U.S. 266, 272 (1994) and *Graham v. O'Connor*, 490 U.S. 386 (1989), that substantive due process claims should be analyzed under specific Amendments. Property claims are thus treated --- and largely dismissed --- under the Fifth Amendment's "taking clause." *Armendariz v. Penman*, 75 F.3d 1311, 1327 (9th Cir. 1996) (en banc); *Madison v. Graham*, 316 F.3d 867, 871 (9th Cir. 2002); *Squaw Valley Dev. Co. v.*

Goldberg, 375 F.3d 936, 949-50 (9th Cir. 2004) ("The parties have not cited to any post-*Armendariz* case, and our research has revealed none, where this Circuit upheld a substantive due process claim based on a deprivation of real property.").

Squaw Valley illustrates that the Ninth Circuit recognizes that "the touchstone of due process is protection of the individual against arbitrary action of government, and the substantive component of the Due Process Clause "forbids the government from depriving a person of life, liberty, or property in such a way that 'shocks the conscience' or 'interferes with rights implicit in the concept of ordered liberty.'" *Squaw Valley*, 375 F.3d at 948.

The Petition cites to *Equity Lifestyle Prop. v. County of San Luis Obispo*, 2007 WL 2694677 (9th Cir. 2007) as a "recent case" but, in that case, the plaintiff's argument "challenges the foundation of the rent control law and would, if accepted, require its invalidation." This is a different focus and inquiry than that involved here.

The Eighth, Tenth and Eleventh Circuits

The Petition asserts that the Eighth, Tenth, and Eleventh Circuits are "embroiled in internal conflicts" over the appropriate standard in substantive due process land use cases, yet then acknowledges that all three circuits, in recent cases, have applied the *Lewis* "shocks the conscience" standard.

The Petition claims a conflict within the Eighth Circuit between a "truly irrational" test and the "shocks the conscience" test. However, *Iowa Coal Mining Co. v. Monroe County*, 257 F.3d 846, 853 (8th Cir. 2001), referred to in the Petition on the "truly irrational" prong, did not cite or consider *Lewis*, but rested on decisions preceding *Lewis*. The other prong to the Petition's assertion, *Koscielski v. City of Minneapolis*, 435 F.3d 898 (8th Cir. 2006), actually disproves the claim of an internal split because that case draws a clear equation between the "truly irrational" test and the "shocks the conscience" test. The same equation was noted by the en banc court in *Singleton v. Cecil*, 176 F.3d 419, 425 n.7 (8th Cir. 1999).

The Petition maintains the Tenth Circuit has a "similar inconsistency." It cites *Signature Props. Int'l Ltd. Partnership v. City of Edmond*, 310 F.3d 1258 (10th Cir. 2002), but the issue there was whether a developer's substantive due process claim against the city was ripe. The Court briefly mentioned an "arbitrariness" standard but, contrary to the Petition's suggestion, this reference is not "inconsistent" with the standard stated in *Camuglia v. City of Albuquerque*, 448 F.3d 1214 (10th Cir. 2006).

In *Camuglia*, the owner alleged his due process rights were violated when an inspector temporarily closed restaurant. He, however, presented no evidence that the inspector's actions "were arbitrary, capricious, or without a rational basis" and thus, the Court found, the allegations did not meet the high standard that this Court set for

substantive due process claims in *Lewis*. The Tenth Circuit explained that "[a]n arbitrary deprivation of an individual's property right can violate the substantive component of the Due Process Clause," but the arbitrariness must be "extreme." *Id.* at 1220. "The ultimate standard for determining whether there has been a substantive due process violation is whether the challenged government action shocks the conscience of federal judges." *Id.*

As for the Eleventh Circuit, the Petition acknowledges that it mirrors the First Circuit's view of *Lewis*.[3]

It is clear from the foregoing that, contrary to the Petition's assertions, the circuit courts are not in "confusion" or "conflict" about the proper standard to apply to a substantive due process claim in a land-use context. Specifically, *Lewis* and *Cuyahoga Falls* affirmed the movement in federal jurisprudence towards the restriction of the use of substantive due process as a means to expand federal oversight of matters within the purview of local authorities. While the Petition tries to fashion a split among the circuits, it is apparent that, in the post-*Lewis* era, the circuits have recognized the extremely circumspect nature of substantive due process review, including in the land-use context. There is no call for this Court's intervention.

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[3] So, too, does the D.C. Circuit, of which the Petition makes no mention. *See Fraternal Order of Police Dep't of Corrections Labor Comm. v. Williams*, 375 F.3d 1141, 1145 (D.C. Cir. 2004).

III. APPLICATION OF A "SHOCKS THE CONSCIENCE" STANDARD DOES NOT CONFLICT WITH THIS COURT'S SUBSTANTIVE DUE PROCESS CASES.

The Petition states that applying the "shocks the conscience" standard to land use disputes is "in conflict with the opinions of this Court." As discussed above, however, the Petition fails to acknowledge *Cuyahoga Falls*, *supra*, 538 U.S. at 198-199, and fails to appreciate that this standard equates "shocks the conscience" with "most egregious" and "arbitrary in the constitutional sense". The application of a "shocks the conscience" standard in the land-use context follows the opinions of this Court.

The Petition's citation to this Court's decision in *Lingle v. Chevron*, 544 U.S. 528, 125 S.Ct. 2074 (2005), does not show otherwise. That case involved a takings claim, with an oil company challenging a governmental regulation as constituting an uncompensated take of property. Even there, this Court cited *Lewis*, stating that, in the context of a due process challenge, a regulation that fails to serve any legitimate governmental objective "may be so arbitrary or irrational that it runs afoul of the Due Process Clause." But such a test, this Court said, was not a valid method of discerning whether private property has been "taken" for purposes of the Fifth Amendment.

CONCLUSION

For the foregoing reasons, the Respondents respectfully request that this Court deny the Petition for Writ of Certiorari.

Respectfully submitted,

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In the

Supreme Court of the United States

EUGENE MONGEAU,

Petitioner,

v.

CITY OF MARLBOROUGH and STEPHEN REID, individually and as Commissioner of Inspectional Services and as a Member of the City of Marlborough Site Plan Review Committee,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

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QUESTION PRESENTED

When it is alleged that a local official denied a land use permit without any health, safety, or welfare justification, is the standard for determining whether the decision violates substantive due process a "shocks the conscience" test, as the First and Third Circuits hold, or a rational basis analysis, as applied in the Second, Fourth, Fifth, Sixth, Seventh, and Ninth Circuits?

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INTRODUCTION

In adopting a rigorous "shock the conscience," rather than a rational basis, test for identifying a substantive due process violation in the land-use context, the decision of the First Circuit Court of Appeals warrants review under three of the criteria listed in Supreme Court Rule 10. *See* Petition at 10-21 (describing conflicts between decision below and other federal appellate courts and this Court); *see also* Brief of Amicus Curiae of New England Legal Foundation and National Association of Industrial and Office Properties, Massachusetts Chapter, at 4-9 (describing conflict between decision below and decisions of state high courts).

Moreover, this case is a proper vehicle for addressing the scope of substantive due process in the land-use arena because the issue is squarely and concretely presented. Given the undeniable reality that federal circuit courts are either at odds with each other on whether the rational basis or shocks the conscience test controls property-based due process claims, or internally confused and inconsistent on the issue, the Court should grant this Petition to bring uniformity on the issue.

ARGUMENT

I

THE DECISION BELOW SQUARELY PRESENTS THE ISSUE OF THE WHETHER A "SHOCKS THE CONSCIENCE" TEST DETERMINES WHEN A CLAIM FOR A VIOLATION OF SUBSTANTIVE DUE PROCESS HAS BEEN STATED IN THE LAND USE CONTEXT

A. The Issue Was Raised Below, and Passed on in a Published Opinion

In their Opposition, Respondents make several remarks suggesting that the issue presented is not properly before this Court because Petitioner Eugene Mongeau (Mongeau) did not argue the issue at the district court level. It is far too late for this defense. This Court will review issues raised or "passed on" in the court below. *United States v. Williams*, 504 U.S. 36, 42 (1992) (noting that the Court "will not review a question not pressed or passed on by the courts below" and this means the Court will review an issue ruled on by an appellate court even if not pressed).

In proceedings before the First Circuit Court of Appeals, Mongeau expressly argued that a rational basis/traditional arbitrariness test determines whether a property owner can state a claim for a substantive due process violation arising from a land-use denial. The First Circuit expressly passed on that issue, holding that a "shocks the conscience" inquiry and not a rational basis approach controls land use due process claims within its jurisdiction. *See* Petition Appendix

(App.) at A-2. Accordingly, the issue of the correct substantive due process standard is properly presented.

B. This Case Is Ripe

In two short sentences at the outset of their Opposition, Respondents also make a vague assertion that this case is not ripe. Opposition at 2-3. Since Respondents do not elaborate on this claim in the remainder of their 27-page Opposition, or offer it as a question presented, the Court need not consider it. *Andrews v. Louisville & N. R. Co.*, 406 U.S. 320,324-25 (1972) (Court will not consider issues not properly raised at petition stage).

In any event, Respondents failed to mention ripeness in the district court and barely mentioned it below and here, and no court has ever passed on the issue, precisely because there is no serious dispute on that ground. Mongeau spent approximately three years submitting and pursuing land use applications, appeals, and variances. App. at A-2-4. Two separate permit applications were denied before he appealed to the City's Zoning Board of Appeals for a variance. He succeeded in securing a variance and then sought and received several extensions of time, during which period he sought and obtained permission from a local site-plan committee and the Massachusetts Department of Environmental Protection. It was only when the City's Building Inspector *still* refused to issue a permit, *despite the variance* granted by the Board and the approval of all relevant bodies, and without any rational basis, that Mongeau sought judicial relief.

Respondents imply that Mongeau should have sought relief from the Zoning Board. Opposition at 3.

However, they do not deny that Mongeau *did* go to the Board for such relief when it became apparent the variance would be delayed, but he was *denied* an additional extension of time. App. at A-4. At that point, Mongeau had been to that body on at least four occasions, the last time being informed the avenue was closed. In this context, it is specious for Respondents to assert, however casually, that Mongeau was required to respond to the Building Inspector's final irrational permit denial by appealing (again) to the Board for variance relief it had already granted and for which it had set a firm ending time. His claim is easily ripe. *See Eide v. Sarasota County*, 908 F.2d 716, 724, n.13, 726 (11th Cir. 1990) (substantive due process claim held ripe as soon as allegedly arbitrary land use decision is made and no further applications needed).

II

RECENT DECISIONS DEMONSTRATE A CLEAR CONFLICT BETWEEN THE DECISION BELOW AND THE DECISIONS OF OTHER FEDERAL COURTS ON THE STANDARD FOR GAUGING WHETHER A REAL PROPERTY DEPRIVATION VIOLATES SUBSTANTIVE DUE PROCESS

Respondents attempt to deny the existence of federal conflicts on the appropriate method for finding a substantive due process violation in land use cases by asserting that decisions since *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), uniformly adopt a "shocks the conscience" approach. This position can be easily disproven by this Court's own review of the precedent cited in the Petition, *see* Petition at 10-18, and

Mongeau will not repeat those points here. However, it may be useful to highlight several of the most obvious conflicts overlooked by Respondents.

A. The Decision Conflicts with the Current Law of the Ninth Circuit

Respondents claim that there is no present conflict between the decision of the First Circuit and the decisions of the Ninth Circuit on the test for determining a substantive due process violation in the land-use context. Yet, a Ninth Circuit decision published on November 1, 2007, refutes this contention.

In *Crown Point Development, Inc. v. City of Sun Valley*,___F.3d___, 2007 WL 3197049 (9th Cir. 2007), the Ninth Circuit considered whether a substantive due process claim based on an allegedly irrational land-use action was viable in the Ninth Circuit after this Court's decision in *Lingle*. *Id.* at *2-3. The *Crown Point* Court held that the plaintiff property owner could proceed on its substantive due process claim against a permit denial because "the United States Supreme Court ruled in *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 532 (2005), that a property owner's challenge to a regulation that does not substantially advance legitimate interests is grounded in due process, not the Takings Clause." 2007 WL 3197049 at *1. In so doing, the court described the test for whether a substantive due process violation occurs as whether the land use action lacks "any substantial relation to the public health, safety, or general welfare." *See id.* at * 3, 4.

Thus, substantive due process claims arising from land-use regulation are independently viable causes of

action in the Ninth Circuit, as in the First, but they are reviewed under markedly different tests. In the First Circuit, a land-use plaintiff must show that the action "shocks the conscience." In the Ninth Circuit, the plaintiff must show that the action had no reasonable relation to a legitimate governmental interest. These differing standards account for very different historical results; while the First Circuit has found only one land-use complaint that stated a claim for a substantive due process violation (and that was 25 years ago), *see Roy v. City of Augusta, Maine*, 712 F.2d 1517, 1524 (1st Cir. 1983), the Ninth Circuit has found a properly stated claim on a number of occasions in the same context under that circuit's rational basis approach. *See, e.g., City of Del Monte Dunes at Monterey, Ltd. v. City of Monterey*, 920 F.2d 1496, 1508 (9th Cir. 1990); *Lockary v. Kayfetz*, 917 F.2d 1150, 1155-56 (9th Cir. 1990).

B. The Decision Below Conflicts with the Current Law of the Fifth Circuit

The foregoing analysis also aptly summarizes the positions of the First Circuit and the Fifth Circuit. Indeed, in answer to the Petition's reference to several post-*Lewis* Fifth Circuit decisions that clearly apply a rational basis test to a land use permit claim—in conflict with the First Circuit's "shocks the conscience" approach—Respondents can muster only a citation to the non-land use permitting case of *Conroe Creosoting Co. v. Montgomery County*, 249 F.3d 337, 341 (5th Cir. 2001).

Conroe is, however, woefully inadequate to dispel the conflict pointed out in the Petition. First, *Conroe* is not pertinent to land use denials. It is also an aberration to the current law of the circuit. Since the

2001 *Conroe* decision, the Fifth Circuit has confirmed on several occasions that the test is whether a permit denial is "rationally related to a legitimate governmental interest," not whether it "shocks the conscience." *Mikeska v. City of Galveston*, 451 F.3d 376, 379 (5th Cir. 2006); *Simi Inv. Co., Inc. v. Harris County, Tex.*, 256 F.3d 323 (5th Cir. 2001) (substantive due process guarantees guard against "illegitimate and arbitrary" land use actions). This analysis builds on other post-*Lewis* decisions. *See, e.g., Hidden Oaks Ltd. v. City of Austin*, 138 F.3d 1036, 1044 (5th Cir. 1998) ([A] permit denial "comports with substantive due process if the action is rationally related to a legitimate government interest."). At best, *Conroe* is an anomaly that has been limited to its facts.

In the Fifth Circuit then, a rational basis test governs whether a land use denial violates substantive due process. And, as in the Ninth Circuit, viable claims have been stated under this approach in the Fifth Circuit. *See Mikeska*, 451 F.3d at 380; *Simi Inv. Co. v. Harris County*, 236 F.3d 240, 251 (2000). This contrasts, of course, with the First Circuit's general refusal to allow any substantive due process land-use claim to go forward under the "shocks the conscience" analysis. Therefore, the conflict between the Fifth and Ninth Circuits and the First Circuit on the appropriate test for a land-use substantive due process claim is real, current, and consequential. This warrants the Court's review of this case.

III

BUCKEYE NEVER SANCTIONED A "SHOCKS THE CONSCIENCE TEST;" IT APPLIED A RATIONAL BASIS TEST, AND DID NOT OTHERWISE REPUDIATE THIS COURT'S PRECEDENT FAVORING THAT TEST IN THE LAND USE CONTEXT

In opposition to Mongeau's claim that the decision of the First Circuit conflicts with this Court's own land use due process precedent, Respondents make much of the decision in *City of Cuyahoga Falls v. Buckeye Community Hope Foundation*, 538 U.S. 188 (2003). *See* Opposition at 2, 8-9. They seem to suggest that *Buckeye* conclusively resolved the issue of the proper due process test by applying a "shocks the conscience" approach. A close reading shows that this is not so.

In *Buckeye*, the Court determined that a government official's delay in issuing building permits did not violate substantive due process guarantees. As an initial part of its analysis, the Court cited to *Lewis* for the proposition that the official's refusal to issue the permits "in no sense constituted egregious or arbitrary government conduct." *Id.* at 198. But in doing so, the Court refrained from using the phrase "shocks the conscience" to describe the relevant test. Nor did the Court repudiate any of its many prior due process cases articulating a "reasonable relationship to a legitimate state interest" inquiry in land use disputes. Most tellingly, when the *Buckeye* Court actually analyzed the challenged conduct, it did so under the rational basis test. *See id.* at 199 ("[T]he law director's instruction to the engineer to not issue the permits

represented an eminently *rational* directive.") (emphasis added).

Consequently, *Buckeye* can be read to *confirm* that the rational basis analysis, rather than "shocks the conscience" test applied by the First Circuit, continues to control land use due process disputes. If not, *Buckeye* simply illustrates that the issue is outstanding and requires review. In the meantime, this Court's existing rational basis land use precedent continues to provide the default rule. This precedent does not support the lower court's application of a "shocks the conscience" test derived from police abuse cases. Nor is such an approach compelled by *Buckeye*. The lower court's departure from this Court's most pertinent land use precedent has resulted in a conflict with other circuits, and state courts, and for these reasons, the Petition should be granted.

CONCLUSION

For the foregoing reasons, the Petition should be granted.

DATED: November, 2007.

Respectfully submitted,

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No. 07 - 533

In the
Supreme Court of the United States
October Term, 2007

EUGENE MONGEAU, *Petitioner*,
v.
CITY OF MARLBOROUGH *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

BRIEF OF AMICI CURIAE NEW ENGLAND LEGAL FOUNDATION AND NATIONAL ASSOCIATION OF INDUSTRIAL AND OFFICE PROPERTIES, MASSACHUSETTS CHAPTER, IN SUPPORT OF PETITIONER

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MOTION OF AMICI CURIAE NEW ENGLAND LEGAL FOUNDATION AND NATIONAL ASSOCIATION OF INDUSTRIAL AND OFFICE PROPERTIES, MASSACHUSETTS CHAPTER, FOR LEAVE TO FILE BRIEF IN SUPPORT OF PETITIONER

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Pursuant to Supreme Court Rule 37.2 (a), counsel for Amici Curiae New England Legal Foundation ("NELF") and National Association of Industrial and Office Properties, Massachusetts Chapter ("NAIOP") have attempted to secure written consent for the filing of the attached Brief of Amici Curiae from counsel for the Petitioner and Respondents.[1] Although counsel for the petitioner granted such consent, counsel for the respondents did not assent to the request of Amici for written consent pursuant to Supreme Court Rule 37.2 (a). Accordingly, counsel for Amici Curiae hereby move this Court pursuant to Supreme Court Rule 37.2 (b) for leave to file the Brief of Amici Curiae that is submitted herewith. Amici base this motion on the grounds set forth below.

NELF and NAIOP seek to bring to the Court's attention their views, and those of their members, concerning the appropriate standard for review of government conduct in regard to land-use determinations challenged as violations of the substantive due process protections of the Fifth and Fourteenth Amendments to the United States

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1 Pursuant to Supreme Court Rule 37.6, counsel for Amici state that no counsel for a party authored the accompanying Brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of the accompanying Brief. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to the Brief's preparation or submission. Pursuant to Supreme Court Rule 37.2 (a), counsel for Amici state that Counsel of Record for all parties received notice at least ten days prior to the due date of Amici Curiae's intention to file this Brief.

Constitution.

NELF is a nonprofit, nonpartisan, public interest law firm, incorporated in Massachusetts in 1977 and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's more than 130 members and supporters include a cross-section of large and small businesses from all parts of New England and the United States.

NELF's members are affected by the business climate in New England and nationwide. Furthermore, some of NELF's members are directly interested in issues related to real estate development and use because they are involved in developing, owning, managing, insuring, and/or financing real property. A healthy real estate industry is a necessary condition of a vibrant economy and requires that developers be provided with appropriate remedies when governmental decision makers abuse their authority and render biased decisions.

NELF has regularly appeared in state and federal courts, as a party, amicus curiae, or counsel, in cases raising issues of general economic significance to the New England and national business communities.[2]

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[2] *See, e.g., Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499 (2007); *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559 (2007); *Rapanos v. United States*, 126 S. Ct. 2208 (2006); *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 126 S. Ct. 1843 (2006); *Kelo v. City of New London*, 545 U.S. 469 (2005); *San Remo Hotel, L.P. v. City of San Francisco*, 545 U.S. 323 (2005); *Exxon Mobil*

This is such a case and Amici Curiae believe that this Brief provides an additional perspective which may aid the Court in determining whether to grant the petitioner's application for a writ of certiorari.

The written consent of counsel for the petitioner to the submission of the accompanying Brief of Amici Curiae pursuant to Supreme Court Rule 37.2 (a) has been submitted together with the accompanying Brief to the Clerk of this Court. On November 1, 2007, counsel for Amici contacted Judy Levenson, Esq., counsel for the respondents, and requested written assent for Amici to submit the accompanying Brief pursuant to Supreme Court Rule 37.2 (a). Counsel for the respondents indicated by email on November 6, 2007, that she would not be able to consent to the filing of the accompanying Brief.

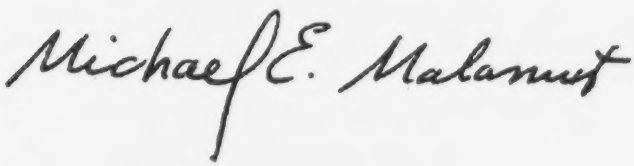
Wherefore, NELF and NAIOP respectfully request that this Court grant Amici Curiae leave to file the accompanying Brief in support of the Petition for a Writ of Certiorari.

Corp. v. Saudi Basic Indus. Corp., 544 U.S. 280 (2005); *Commissioner v. Banks*, 543 U.S. 426 (2005).

Respectfully submitted,

NEW ENGLAND LEGAL FOUNDATION and NATIONAL ASSOCIATION OF INDUSTRIAL AND OFFICE PROPERTIES, MASSACHUSETTS CHAPTER,

By their attorneys,



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November 21, 2007

QUESTION PRESENTED

When it is alleged that a local official denied a land-use permit without any health, safety, or welfare justification, is the standard for determining whether the decision violates substantive due process a "shocks the conscience" test, as the First and Third Circuits hold, or a rational basis analysis, as applied in the Second, Fourth, Fifth, Sixth, Seventh, and Ninth Circuits?

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INTEREST OF AMICI CURIAE

Amici Curiae New England Legal Foundation ("NELF") and National Association of Industrial and Office Properties, Massachusetts Chapter ("NAIOP") seek to bring to the Court's attention their views, and those of their members, concerning the appropriate standard for review of government conduct in regard to land-use determinations challenged as violations of the substantive due process protections of the Fifth and Fourteenth Amendments to the United States Constitution.[1]

1 Pursuant to Supreme Court Rule 37.6, counsel for Amici state that no counsel for a party authored this Brief in whole or in part, and no counsel or party made a monetary contribution intended to fund its preparation or submission. No person other than Amici Curiae, their members, or their counsel made a monetary contribution to the Brief's preparation or submission.

NAIOP is an association of over 1300 professionals and organizations in Massachusetts with an interest in the responsible ownership, development, management, and financing of properties throughout the Commonwealth. Established in 1978, NAOIP provides educational, networking and business development opportunities for all real-estate-related professionals and represents the industry through its effective public affairs advocacy.

NELF is a nonprofit, nonpartisan, public interest law firm, incorporated in Massachusetts in 1977 and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's more than 130 members and supporters include a cross-section of large and small businesses from all parts of New England and the United States.

NELF's members are affected by the business climate in New England and nationwide. Furthermore, some of NELF's members are directly interested in issues related to real estate development and use because they are involved in developing, owning, managing, insuring, and/or financing real property. A

Pursuant to Supreme Court Rule 37.2 (a), counsel for Amici state that Counsel of Record for all parties received notice at least ten days prior to the due date of Amici Curiae's intention to file this Brief. Counsel for the petitioner consented to its filing, while counsel for Respondent withheld assent. Pursuant to Supreme Court Rule 37.2 (b), counsel for Amici Curiae have moved for leave to file this Brief, which motion is bound herewith.

healthy real estate industry is a necessary condition of a vibrant economy and requires that developers be provided with appropriate remedies when governmental decision makers abuse their authority and render biased decisions.

NELF has regularly appeared in state and federal courts, as a party, amicus curiae, or counsel, in cases raising issues of general economic significance to the New England and national business communities.[2] This is such a case and Amici Curiae believe that this Brief provides an additional perspective which may aid the Court in determining whether to grant the petitioner's application for a writ of certiorari.

STATEMENT OF THE CASE

Amici Curiae adopt the Statement of the Case contained in the Brief of Petitioner Eugene Mongeau.

SUMMARY OF ARGUMENT

The United States Courts of Appeals for the First and Third Circuits—by requiring proof of government conduct that "shocks the conscience" in order for a property developer to prevail on a land-use-related substantive due process claim—imposes an impermissibly high standard on those seeking redress

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[2] *See, e.g., Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499 (2007); *Watters v. Wachovia Bank, N.A.*, 127 S. Ct. 1559 (2007); *Rapanos v. United States*, 126 S. Ct. 2208 (2006); *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.*, 126 S. Ct. 1843 (2006); *Kelo v. City of New London*, 545 U.S. 469 (2005); *San Remo Hotel, L.P. v. City of San Francisco*, 545 U.S. 323 (2005); *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.*, 544 U.S. 280 (2005); *Commissioner v. Banks*, 543 U.S. 426 (2005).

from the courts for civil rights violations. As the petitioner argues, the First and Third Circuits' standard conflicts with that adopted by a majority of the federal Courts of Appeals. Additionally, Amici argue that review is warranted because the First and Third Circuits' minority standard also conflicts with that utilized by many state courts, including state courts within those circuits, when considering federal civil rights violations. This conflict allows forum shopping between state and federal courts in the same area and runs contrary to the fair administration of justice. Moreover, the test adopted by the First and Third Circuits contravenes this Court's substantive due process jurisprudence in land-use cases.

ARGUMENT

I. Certiorari is warranted because of the conflict over the appropriate standard of review for substantive due process claims between that adopted by the Courts of Appeals for the First and Third Circuits and those adopted by state courts within their geographical areas.

Respondent, the City of Marlborough, Massachusetts, (the "City") allegedly violated the rights of Petitioner Eugene Mongeau ("Mongeau") to due process under the Fifth and Fourteenth Amendments to the United States Constitution[3]

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3 The Fifth Amendment states: "No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." The Fourteenth Amendment states: "[N]or shall any state

through the actions of Respondent Commissioner of Inspectional Services Steven Reid ("Reid"). Mongeau alleges that Reid, biased against Mongeau for refusing to make a voluntary payment in exchange for permission to build, treated Mongeau's building permit application and site permit review in a hostile and cavalier manner. This allegedly caused delays that resulted in expiration of permits outside Reid's control before Mongeau could commence building, despite an eminent domain settlement between Mongeau and the City granting Mongeau authority to build. *Mongeau v. City of Marlborough,* 492 F.3d 14, 15–16 (1st Cir. 2007).

The plain wording of the due process clauses of the United States Constitution grants significant protection to property, as well as life and liberty. U.S. Const. amend. V, amend. XIV. Substantive due process protects the interests of life, liberty, and property when the requisite process is followed but the decisions are biased. Peter J. Rubin, *Square Pegs and Round Holes: Substantive Due Process, Procedural Due Process, and the Bill of Rights,* 103 Colum. L. Rev. 833, 836–39 (2003). Substantive due process is the chief means to protect real property owners from bad faith land-use decisions. *Lingle v. Chevron USA, Inc.,* 544 U.S. 528, 540–41 (2005).

As the petitioner explains, Petition at 10–17, the federal circuits are divided about the nature of the hurdle a landowner or developer must overcome in

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deprive any person of life, liberty, or property, without due process of law."

order to succeed on a substantive due process claim in the land-use context. The United States Courts of Appeals for the First Circuit (as in the case below) and Third Circuit adopt the onerous "shocks the conscience" standard derived from the law regarding arrest and detention of prisoners as developed in *County of Sacramento v. Lewis,* 523 U.S. 833 (1998), and *Rochin v. California,* 342 U.S. 165 (1952). *See Mongeau,* 492 F.3d at 17; *Eichenlaub v. Township of Indiana,* 385 F.3d 284 (3d Cir. 2004); *United Artists Theatre Circuit, Inc. v. Township of Warrington,* 316 F.3d 392, 399 (3d Cir. 2003); *PFZ Props. v. Rodriguez,* 928 F.2d 28, 31 (1st Cir. 1991).

Other federal courts distinguish *Lewis* as applicable to substantive due process claims only in the context of criminal arrest and detention or, more specifically, high-speed police chases, the fact scenario at issue in *Lewis. See, e.g., Khan v. Gallitano,* 180 F.3d 829 (7th Cir. 1999). As is detailed in the Petition, the majority of United States Courts of Appeals—the Second, Fourth, Fifth, Sixth, Seventh, and Ninth Circuits—utilize a standard highly deferential to governmental actors but permitting challenges based on provable claims of bias and misconduct, unlike the "shocks the conscience" test. *See Equity Lifestyle Props., Inc. v. County of San Luis Obispo,* 2007 WL 2694667 at *8 (9th Cir. Sept. 17, 2007) (rational basis); *O'Mara v. Town of Wappinger,* 485 F.3d 693, 700 (2d Cir. 2007) ("arbitrary and irrational" conduct); *Mikeska v. City of Galveston,* 451 F.3d 376, 378 (5th Cir. 2006) (rational basis); *Tri-County Paving, Inc. v. Ashe County,* 281 F.3d 430, 440 (4th Cir. 2002) ("arbitrary or

irrational" conduct); *Brody v. City of Mason,* 250 F.3d 432, 438 (6th Cir. 2001) ("arbitrary and capricious" conduct); *Centres, Inc. v. Town of Brookfield,* 148 F.3d 699, 704 (7th Cir. 1998) ("arbitrary and unreasonable" conduct).

Not only is there a division among the federal Courts of Appeals, but there is also a division between the First and Third Circuit Courts of Appeals, on the one hand, and state courts within their geographic areas, on the other. This is significant because state courts have co-equal original jurisdiction with federal courts in regard to federally based civil rights violations brought pursuant to 42 U.S.C. § 1983. *Martinez v. California,* 444 U.S. 277, 283 n.7 (1980). Conflict between state courts of last resort and federal Courts of Appeals in regard to an important question of federal law is a well recognized basis for granting a writ of certiorari. U.S. Sup. Ct. R. 10 (a). It is especially important in a case such as this where the state courts within the geographic area of a federal circuit differ from that circuit's federal courts, leading to the possibility of disparate results for the same event depending on where suit is brought.

In this case the First and Third Circuits' "shocks the conscience" standard for land-use-related substantive due process claims conflicts with the standards imposed by a number of state courts of last resort within the geographic territory associated with the two circuits. For example, within the First Circuit, Maine and Rhode Island review such claims under the "arbitrary and capricious" standard. *See, e.g., Kittery Retain Ventures, LLC v. Town of Kittery,* 856 A.2d

1183, 1193, 2004 ME 65, at ¶ 32, *cert. denied,* 544 U.S. 906 (2005); *Brunelle v. Town of South Kingstown,* 700 A.2d 1075, 1083–84 (R.I. 1997) ("arbitrary and capricious"). New Hampshire uses the "rational basis" standard. *Boulders at Stratford, LLC v. Town of Strafford,* 133 N.H. 633, 637, 903 A.2d 1021, 1026 (2006). Massachusetts uses "rational basis" jurisprudence, inquiring into whether the conduct was "arbitrary or unreasonable." *Zuckerman v. Hadley,* 442 Mass. 511, 516, 813 N.E.2d 843, 848 (2004) (rational basis); *Johnson v. Edgartown,* 425 Mass. 117, 121, 680 N.E.2d 37, 40 (1997). Puerto Rico uses "rational basis" review for claims arising out of government actions in civil matters. *See Collazo v. Commonwealth of Puerto Rico,* 1993 P.R. Offic. Trans. 839, 857, 134 P.R. Dec. 28, at § III (C). In other words, all states within the First Circuit use a more lenient standard for determining the validity of land-use-related federal substantive due process claims than the First Circuit's "shocks the conscience" test.

Within the Third Circuit, the Pennsylvania state courts appear to use a rational basis standard, asking whether the challenged conduct is "arbitrary and unreasonable and ha[s] no substantial relationship to promoting the public health, safety and welfare." *McGonigle v. Lower Heidelberg Township Zoning Hearing Bd.,* 858 A.2d 663, 668 (Pa. Commw. 2004) (citing *Boundary Drive Assoc. v. Shrewsbury Township Bd. of Supervisors,* 507 Pa. 481, 489–91, 491 A.2d 86, 90 (1985)). The New Jersey and Delaware courts, on the other hand, have followed *United Artists* and applied the Third Circuit's "shocks the conscience" test.

See Salem Church (Delaware) Assocs. v. New Castle County, No. Civ.A. 20305-NC, 2006 WL 2873745, at *13 n.113 (Del. Ch. Oct. 6, 2006); *Plemmons v. Blue Chip Ins. Servs., Inc.,* 387 N.J. Super. 551, 568–69, 904 A.2d 825, 836 (App. Div. 2003).

This divergence between state and federal courts covering the same geographical area can create injustice, uncertainty, and gamesmanship, all detrimental to property owners and developers as well as government land-use regulators seeking certainty as to the level of scrutiny of their conduct. Given its magnitude and significance, this is a conflict requiring resolution by the Court.

II. The "shocks the conscience" test adopted by the Courts of Appeals for the First and Third Circuits contravenes this Court's substantive due process jurisprudence regarding land-use-related claims.

The First and Third Circuits' "shock the conscience" test is inconsistent with this Court's own guidance. The less onerous, but still highly deferential, arbitrary conduct standard has the imprimatur of this Court's precedent in the land-use area. Thus, as is discussed in greater detail in the Petition at 18–21, the seminal substantive due process land-use decision by this Court overturned a local zoning determination on the ground that it was arbitrary and bore no relation to a proper governmental purpose. *Nectow v. City of Cambridge,* 277 U.S. 183, 187 (1928).[4] *See* Brian W.

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4 A court may set aside a land-use decision that "'has no foundation in reason and is a mere arbitrary or irrational exercise

Blaesser, *Substantive Due Process Protection at the Outer Margins of Municipal Behavior,* 3 WASH. U. J.L. & POL'Y 583, 585 (2000).[5]

In this day and age, many land-use decisions involve considerable discretion on the part of local administrative decision makers.

> [M]any local governments are currently attempting to address increasingly complex, sometimes subjective issues—preservation of "community character," urban design, "cumulative impacts" of land uses, growth control, environmental protection, affordable housing and infrastructure needs—through discretionary regulation . . . .

Blaesser, 3 WASH. U. J.L. & POL'Y at 600. *See id.* at 584. The infusion of considerable discretion into regulatory determinations allows a considerable role for "improper motives such as personal animus,

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of power having no substantial relation to the public health, the public morals, the public safety or the public welfare in its proper sense.'" *Nectow,* 277 U.S. at 187–88 (quoting *Village of Euclid v. Ambler Realty Co.,* 272 U.S. 365, 395 (1926)).

5 The right not to be subject to arbitrary or capricious action by a governmental, legislative, or administrative action is a substantive due process right. In the case of irrational or wrongful land use regulatory decisions that may not amount to a taking, landowners and developers have relied on substantive due process claims in federal court as an important means to remedy such action.

Blaesser, 3 WASH. U. J.L. & POL'Y at 585.

political bias, or conflicts of interest" in the decision making process. *Id.*

Where it occurs, such improperly motivated, bad-faith conduct obviously harms property owners and discourages real estate investment. Property owners harmed by such conduct should be able to challenge it as arbitrary or irrational in order to obtain redress for and deter bad-faith bureaucratic determinations.

Scholarly analysis has been sharply critical of the Third Circuit's recent adoption of the "shocks the conscience" test in land-use cases as contrary to established precedent and basic fairness. *See* Clifford B. Levine & L. Jason Blake, *United Artists: Reviewing the Conscience Shocking Test under Section 1983,* 1 Seton Hall. Cir. Rev. 101, 117 (2005);[6] Shari K. Gekoski, Circuit Review, *Local Governments that*

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6 If the "shocks the conscience" test is construed to create a more stringent test, permitting arbitrary government conduct to proceed unchecked unless the conduct is deemed "conscience shocking," the new test may be challenged as being inconsistent with the historically stated principles of substantive due process protection. . . . [A] deliberate decision indifferent to the law by a governmental official sworn to uphold the law should constitute "an arbitrary exercise of the powers of government" and thus violate the Due Process Clause regardless of the fact that it may not be "conscience shocking" because people have become desensitized to corrupt and/or arbitrary government action.

Levine & Blake, 1 Seton Hall. Cir. Rev. at 117–18.

Purposely Delay Land Use Projects: What Law Applies3 49 Vill. L. Rev. 957, 979 (2004);[7] Parna A. Mehrbani, Comment, *Substantive Due Process Claims in the Land-Use Context: The Need for a Simple and Intelligent Standard of Review,* 35 Envtl. L. 209, 240 (2005).[8]

Only if arbitrary governmental action is held up to scrutiny will government officials have meaningful

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7 The Third Circuit should have followed its long history of applying the improper motive test . . . . [I]f land owners and developers are victims of substantive due process violations by local government officials, even the most improper behavior may not be enough to satisfy the new requirement by the Third Circuit. . . . Instead of defaulting to its own precedent, the Third Circuit relied on the Supreme Court's decision in *Lewis,* a case that was radically different and did not squarely address the issue of substantive due process in a land use context. As a result, there is confusion not only within the Third Circuit, but also in the district court as to what law applies.

Gekoski, 49 Vill. L. Rev. at 978–79 (footnotes omitted).

8 If the federal government refuses to act as a check on local government, the potential for imbalanced and inappropriate decision making could be just as harmful as the potential for a lenient standard of review to allow a flood of disappointed landowners into federal court. It is better to be overly cautious and overly protective of the inalienable right of property ownership.

Mehrbani, 35 Envtl. L. at 240. *See id.* at 240–41 (suggesting scrutiny of local governmental authorities' land-use determinations for arbitrary and unreasonable conduct).

standards to live up to in keeping with the highest traditions of public service. Moreover, unless arbitrary conduct is reviewable as a substantive due process violation, property owners will effectively have no recourse against bad faith conduct by government actors during land-use proceedings, as "even the most improper behavior may not be enough" to satisfy the First and Third Circuits' standard. Gekoski, 49 Vill. L. Rev. at 979. With a "shocks the conscience" test, citizens will become more and more inured to arbitrary and self-indulgent behavior by local officials as such conduct, without scrutiny, becomes more routine. "Ironically, the more nefarious a government's reputation, the more immune it may be from challenge." Levine & Blake, 1 Seton Hall. Cir. Rev. at 118 n.100. Unless this Court reinforces its jurisprudence in *Nectow* treating arbitrary and irrational local government action as a violation of substantive due process, arbitrary regulatory conduct may cause a vicious downward cycle of expectations for governmental behavior.

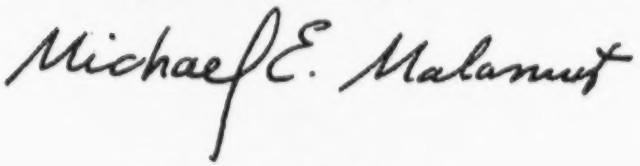
CONCLUSION

For the reasons stated above, this Court should grant the petition of Petitioner Eugene Mongeau for a writ of certiorari.

Respectfully submitted,

NEW ENGLAND LEGAL FOUNDATION and NATIONAL ASSOCIATION OF INDUSTRIAL AND OFFICE PROPERTIES, MASSACHUSETTS CHAPTER,

By their attorneys,



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